

NOTES AND COMMENTS

BANK CHARTER, BRANCHING, HOLDING COMPANY AND MERGER LAWS: COMPETITION FRUSTRATED

ENTRY, branching, acquisition by a holding company, and merger influence the size and number of banks in the industry. While non-legal factors induce the undertaking of these activities, their accomplishment is the subject of an extensive legal framework. This Comment attempts to determine what kind of banking structure is most desirable, whether the existing legal framework fosters such a structure, and, if not, what changes should be made in the existing framework.

A BASIS FOR EVALUATION

Decisions by bank regulatory agencies whether a new bank should be chartered, a new branch established, or an existing bank acquired by a holding company or merged into another bank may have in common the question of whether more or fewer banking alternatives are desirable. Were the traditional American predilection for business competition adopted,¹ the conclusion that numerous banking alternatives are desirable would follow.² Competition can function only if bank-users—primarily borrowers and depositors—may choose among a number of banking institutions,³ and if this choice is based upon which institution makes the most attractive offer.⁴ Thus, since banks need sufficient deposits to maintain revenue-producing loan volume,⁵ each bank must

1. Compare S. REP. NO. 1095, 84th Cong., 1st Sess. 10 (1955), with S. REP. NO. 196, 86th Cong., 1st Sess. 16 (1959) and H.R. REP. NO. 1416, 86th Cong., 2d Sess. 2 (1960); see also *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945); ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 1-3 (1955); NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* 23-25 (1960); WILCOX, *PUBLIC POLICIES TOWARD BUSINESS* 49-50 (rev. ed. 1960).

2. See Anderson, *Competitive Factors in Business Loans*, in *BUSINESS LOANS OF AMERICAN COMMERCIAL BANKS* 299 (Beckhart ed. 1959); Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1298 (1948) ("monopoly and competition . . . are matters of degree, of the ease or difficulty of substitution, of the availability of 'sufficient' alternatives to buyers and sellers"); Smith, *Effective Competition: Hypothesis for Modernizing the Antitrust Laws*, 26 N.Y.U.L. REV. 405, 413 (1951) ("The most important requisite of Effective Competition is the existence of adequate alternatives.").

3. See ALHADEFF, *MONOPOLY AND COMPETITION IN BANKING* 21 (1954).

4. WILCOX, *op. cit. supra* note 1, at 11. A more attractive offer includes not only differences in price, but also differences in such other items of cost as services, location, architecture, and personnel. If, for example, pleasing bank architecture satisfies a customer better than other qualities, his selection of a well-designed bank is not anti-competitive because, as banks compete to attract his business, his choice will efficiently allocate resources to fulfillment of his desires.

5. HART, *MONEY, DEBT, AND ECONOMIC ACTIVITY* 32 (2d ed. 1953).

offer depositors advantages at least as favorable as those provided by other banks so that funds will not be attracted away. Likewise, a bank must offer borrowers advantages at least as favorable as other banks offer. Motivated by a desire to maximize profits,⁶ a banker will expand operations so long as the revenue derived from additional transactions covers the cost of making them.⁷ But to effect any increase in loan volume,⁸ a bank must offer both borrowers and depositors terms more favorable than those offered by the other banks available to them. Since each bank must vie with other banks in satisfying borrowers through such advantages as low interest rates, and depositors through such advantages as high interest rates on time deposits or low service charges on demand deposits, the banking system will efficiently allocate depositors' funds to borrowers' needs.⁹

If the number of alternatives is substantially reduced, however, bank-users' choices may not force efficient bank behavior. Where there is only one bank, bank users can not, except by refusing to deal, use their patronage to express disapproval of its policies.¹⁰ Even where there are a few banks but each bank knows that any advantage it offers borrowers or depositors will immediately be imitated by other banks, nullifying any expected gains, there is little incentive to benefit customers.¹¹ In following the leader, these banks will, in effect, act as one bank, offering bank users no real opportunity to "go elsewhere." Moreover, such a reduction in banking alternatives may reduce credit availability to marginal risk borrowers. Since risk appraisal is a highly subjective exercise, banks are likely to differ reasonably as to the credit worthiness of a borrower.¹² Thus, a borrower who would qualify under some methods of risk appraisal, but not under others, has less opportunity to obtain credit the fewer the available alternatives. Because new businesses and expanding small businesses are generally marginal risk borrowers,¹³ decreased credit availability may affect the competitiveness and growth of the rest of the economy. Apart from unintentional differences in credit appraisal, decreased alternatives may

6. WILCOX, *op. cit. supra* note 1, at 10.

7. See SAMUELSON, *ECONOMICS* 459-67 (4th ed. 1958).

8. Although investment of bank resources may also yield revenue, and "investors" can be read for "borrowers" in the textual analysis, attention has been directed to lending because that is the "characteristic role" of commercial banks. See ALHADEFF, *op. cit. supra* note 3, at 11-12.

9. See WILCOX, *op. cit. supra* note 1, at 11-13; ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 317-18 (1955); SAMUELSON, *op. cit. supra* note 7, at 39-42.

10. See WILCOX, *op. cit. supra* note 1, at 11.

11. See Robinson, *What is Perfect Competition?*, 49 Q.J. ECON. 104 (1935); SAMUELSON, *op. cit. supra* note 7, at 488; Chandler, *Monopolistic Elements in Commercial Banking*, 46 J. POL. ECON. 1, 9 (1938).

12. FEDERAL RESERVE BOARD, *FINANCING SMALL BUSINESS* 411 (1958). Since the granting of loans is a highly confidential process, Chandler, *supra* note 11, at 6, inter-bank intelligence requisite to the consciously parallel action which prevails in areas of few banks will not be present. Thus, although such action may standardize loan terms in these areas, it will not affect differences in credit availability.

13. FEDERAL RESERVE BOARD, *op. cit. supra* note 12, at 402-03.

increase the probability of credit discrimination. Two banks, for example, which finance all the shoe retailers in their area may refuse to grant credit even to a low-risk borrower planning to open another shoe store. Whether the bankers' belief that a new competitor would impair the existing retailers' ability to repay is justified, such action could deprive the public of increased shoe competition.¹⁴

But competition may be unworkable in banking, or the number of banking alternatives sufficient to allow effective customer choice may be undesirable for other reasons. Economies of scale in the banking industry may be so great that monopoly would inevitably result. The money market in which banks are but one of many kinds of financial institutions may be so competitive that even a single giant bank could not behave as a monopolist. Overzealous attempts at profit maximization without due concern for risk may result in insolvency, defeating legitimate expectations of depositors. Either overly liberal or overly conservative loan policies motivated by erroneous profit maximization or solvency appraisals may overexpand or unduly contract the nation's money supply, producing severe inflationary or deflationary consequences. Whether any of these factors substantially impairs the usefulness of effective banking alternatives or makes them unimportant is crucial in deciding whether numerous alternatives are desirable.

If banks became more efficient as they grew larger, larger banks, by reason of their increased efficiency, could underbid smaller banks until only a giant bank, in place of a large number of banking alternatives, remained.¹⁵ (This result would probably evoke a system of governmentally franchised monopoly combined with rate and service regulation.) Available economic analysis,¹⁶ however, indicates that as the size of the bank increases costs decline for unit banks,¹⁷ but increase for banks having branches;¹⁸ evidence for systems wherein stock of member banks is held by one corporation is unavailable.¹⁹ Even among unit banks, however, unit costs are fairly constant among those having \$2,000,000 to \$50,000,000 in deposits;²⁰ only the very large and the very small unit banks differ significantly.²¹ This difference is apparently a consequence of the high proportion of low-cost large loans and low-cost demand deposits characteristic of large banks.²² But whether larger banks effect significant operat-

14. *But see* ALHADEFF, *op. cit. supra* note 3, at 226-27. For another example of the possibility of bank influence restricting competition in non-financial markets, see Berle, *Banking Under the Anti-Trust Laws*, 49 COLUM. L. REV. 589, 603-04 (1949).

15. See BOWMAN & BACH, *ECONOMIC ANALYSIS AND PUBLIC POLICY* 302-19 (2d ed. 1949).

16. Research has disclosed but one study of bank efficiency—ALHADEFF, *op. cit. supra* note 3, at 77-107. Unfortunately, Professor Alhadeff's data provide no breakdown more detailed than labor economies, interest economies, and miscellaneous economies.

17. ALHADEFF, *op. cit. supra* note 3, at 83.

18. *Id.* at 87-88.

19. *Cf.* NADLER & BOGEN, *THE BANK HOLDING COMPANY* 18 (1959).

20. See note 17 *supra*.

21. *Ibid.*

22. *Id.* at 85-86.

ing efficiencies is not known;²³ the available evidence intimates that they are not significant.²⁴ Moreover, if further empirical analysis reveals that increased size effects significant economies in a few well-defined, mechanical banking operations, these could probably be handled on a group basis, while policy decisions remained unaffected. For example, bookkeeping, a significant item of expense in banking operations, can now be expedited by electronic computing machines.²⁵ Although the high cost of such devices may preclude their acquisition by the smaller bank, a group of such banks could and indeed has enjoyed these machine-age benefits by sharing the use of an automated bookkeeping center jointly owned.²⁶ The banks can act independently, however, in such matters as granting loans or attracting deposits.

Since commercial banks are but one kind of credit institution, the availability of other credit sources might render decreases in bank alternatives unimportant. Mutual savings banks, savings and loan associations, postal savings accounts, and U.S. government bonds offer alternatives to bank time deposits.²⁷ In addition, mutual savings banks, saving and loan associations, and life insurance companies compete with banks for long term loans, especially real estate mortgages.²⁸ But time deposits constitute about 35 per cent of bank resources²⁹ and real estate loans only 24 per cent of bank loans.³⁰ By far the more impor-

23. Although Professor Alhadeff mentions labor economies resulting from specialization and miscellaneous economies, both of which are made possible by large volume, *id.* at 86-87, he does not and, indeed, from his data, cannot say how important they are.

24. Since Professor Alhadeff has found that both the size and kind of loan characteristic of different sized banks are "important" determinants of economies in larger banks, it is questionable how important economies which result from operating efficiencies are. Moreover, in comparing branch banks and small unit banks, Professor Alhadeff states: "Neither publicly available statistics nor those made available for this study provide proof that branch banks can negotiate a small loan more cheaply than a small (or medium) unit bank because of cost economies integrally related to branch banking." There is only a "strong presumption . . . [of] net economies." *Id.* at 102-05. See also COMMISSION ON MONEY & CREDIT, MONEY AND CREDIT 165 (1961) ("The evidence suggests that small unit banks can compete successfully with large banks even in the long run.").

25. See Halton, *Making Automation a Reality*, Burroughs Clearing House, May 1960, p. 35.

26. *Centralizing Accounting*, Banking, April 1960, p. 44; *Three Smaller Banks Pioneer in Bookkeeping Center*, Burroughs Clearing House, March 1960, p. 15; see also *Cooperative Automation for Smaller Banks*, Banking, June 1959, p. 58.

27. HART, *op. cit. supra* note 5, at 123-29; GUTHEMANN & DOUGALL, CORPORATE FINANCIAL POLICY 445-55, 464-66 (3d ed. 1955); SAMUELSON, *op. cit. supra* note 7, at 288; see generally FREEMAN, MUTUAL COMPETITION (1959); Alhadeff & Alhadeff, *The Struggle for Commercial Bank Savings*, 72 Q.J. ECON. 1 (1958).

28. *Ibid.*

29. See 47 FED. RESERVE BULL. 1197 (1961) (time and demand deposits compared for commercial banks).

30. See 47 FED. RESERVE BULL. 1200 (1961) (real estate loans compared with total loans); see also ALHADEFF, *op. cit. supra* note 3, at 11. Commercial banks also compete to some extent with finance companies for personal loans. See HART, *op. cit. supra* note 5, at 128-29. But since the finance companies borrow their loanable funds from banks and relend to high risk borrowers at high interest rates, competition with commercial banks is

tant bank operations are acceptance of demand deposits and extension of business loans.³¹ Banks apparently have little competition in these functions.³² The nearest alternative, trade credit provided by finance companies or suppliers,³³ is an imperfect substitute because of its high interest cost.³⁴ Moreover, since banks are the only institution which can accept demand deposits,³⁵ a very cheap source of loanable funds, it seems doubtful that monopolistic bank practices in these functions could ever induce the emergence of alternatives. Bankers would raise the price of credit to a point just below the price at which other institutions could acquire loanable funds by methods more costly than acceptance of demand deposits.³⁶

Overzealous attempts at profit maximization by competing banks might induce insolvency. In an effort to increase profits, banks may lend to undependable borrowers because they can obtain higher interest rates for the greater risks.³⁷ In addition, in some areas there may be so many banks that some or all may have to lend to risky enterprises to stay in business.³⁸ But if these risks become too numerous or too great, frequent bank insolvencies may result. Since bank capital normally provides less than 10 per cent of bank assets,³⁹ the greatest burden of these insolvencies would fall on depositors. This result seems unfair in view of depositors' expectations. Usually, those with savings accounts have chosen to deposit their money in banks, rather than to hoard, because, regardless of the interest rate,⁴⁰ they expect that their funds will be safer there. Those with checking accounts rely primarily on banks to provide a medium of exchange.⁴¹ In neither case do depositors believe they are making an investment with risk of loss. Since banks presumably benefit from these modest expectations by paying depositors less than they would have to pay in-

limited. *Ibid.*; see also ALHADEFF, *op. cit. supra* note 3, at 16-17; *Moran v. State Banking Comm'r*, 322 Mich. 230, 239-40, 33 N.W.2d 772, 776 (1948).

31. See HART, *op. cit. supra* note 5, at 39 ("The great bulk of commercial bank deposits are 'demand deposits.'"). ALHADEFF, *op. cit. supra* note 3, at 12 ("business loans are the largest single component in commercial bank loan portfolios").

32. ALHADEFF, *MONOPOLY AND COMPETITION IN BANKING* 19 (1954).

33. *Id.* at 12-19.

34. *Id.* at 14-15.

35. By definition, banks are institutions which accept deposits, 1 MICHIE, *BANKS AND BANKING* ch. 1, § 2 (1956); see also HART, *op. cit. supra* note 5, at 21.

36. Cf. Hodgman, *The Deposit Relationship and Commercial Bank Investment Behavior*, 43 REV. ECON. & STATISTICS 257, 264 (1961); see also *Peoples Savings Bank v. Stoddard*, 359 Mich. 297, 330-32, 102 N.W.2d 777, 794 (1960).

37. See Harfield, *Legal Restraints on Expanding Banking Facilities, Competition and the Public Interest*, 14 BUS. LAW. 1016, 1021 n.5 (1959).

38. See generally ECONOMIC POLICY COMMISSION OF THE AMERICAN BANKERS ASSOCIATION, *THE BANK CHARTERING HISTORY AND POLICIES OF THE UNITED STATES* (1935); see also *Schaafe v. Dolley*, 85 Kan. 598, 606-09, 118 Pac. 80, 84 (1911).

39. See HART, *op. cit. supra* note 5, at 36.

40. Alhadeff & Alhadeff, *supra* note 27, at 6; see also *Does Higher Interest Lure More Money Into Savings?*, BUS. WEEK, March 16, 1957, p. 190.

41. SAMUELSON, *op. cit. supra* note 7, at 288.

vestors for loanable funds, it would be inequitable to depositors if banks did not fulfill these expectations. Moreover, because bank insolvencies destroy sources of credit, not only borrowers but also others who rely upon the borrowers' ability to secure loans may be adversely affected.⁴²

Governmental regulation could and, in fact, has minimized the problems of bank insolvency without substantially impairing competition. The conclusion that many bank failures are caused by entry of banks into areas unable to support them has led to control over entry,⁴³ the most significant governmental limitation upon competition. In addition to meeting capital and managerial requirements,⁴⁴ prospective entrants must demonstrate a public need indicating prospects of successful operation without impairing existing banks.⁴⁵ While this control allows as many banking alternatives in an area as free entry would provide in the long run,⁴⁶ it qualifies the ability of prospective banks to displace existing ones. It is probable, however, that prospective banks will most often seek entry into areas where banking opportunities are expanding⁴⁷ or, if displacement is the goal, acquisition of existing banks remains a mode of entry.

In addition, government exercises control over bank assets. Types of bank investments are limited.⁴⁸ Loans as well as investments are periodically examined by government agencies to determine whether they meet minimal risk standards.⁴⁹ And apart from the risk qualities of individual assets, central bank controls on credit expansion may act as a caveat to banks lending an excessive proportion of deposits.⁵⁰ Governmental agencies also insure deposits up to \$10,000.⁵¹ Since losses (and resulting insolvency) are the antitheses of profit

42. See Berle, *supra* note 14, at 592; Harfield, *supra* note 38, at 1021; Wall v. Fenner, 76 S.D. 252, 255, 76 N.W.2d 722, 724 (1956).

43. See note 39 *supra* and Stokes, *Public Convenience and Advantage in Applications for New Banks and Branches*, 74 BANKING L.J. 921, 922-23 (1957).

44. See notes 63-69 *infra* and accompanying text.

45. See notes 70-82 *infra* and accompanying text.

46. In areas capable of supporting only a few banks, consciously parallel action will occur. See note 11 *supra* and accompanying text. Even in these areas, however, more rather than fewer alternatives are desirable because even though credit terms will be similar whether, say, 2 or 4 banks follow each other, credit availability to marginal risk borrowers will increase with more alternatives. See note 12 *supra* and accompanying text. The alternative of regulating bank charges and service in the less populous areas while fostering competition in more populous areas seems too complicated even if workable. See *Peoples Savings Bank v. Stoddard*, 359 Mich. 297, 332-34, 102 N.W.2d 777, 795 (1960).

47. See note 121 *infra* and accompanying text.

48. See, e.g., 44 Stat. 1226 (1927), as amended, 12 U.S.C.A. § 24 (Supp. 1960), and 12 C.F.R. §§ 1-6 (1959); see also Harfield, *supra* note 37, at 1022.

49. See, e.g., 38 Stat. 271 (1913), as amended, 12 U.S.C.A. § 481 (Supp. 1960); see generally 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 4.04 (1958); Paulger, *Policy and Procedure in Bank Examination*, in BANKING STUDIES 213 (1941); HART, *op. cit. supra* note 5, at 89-91.

50. The primary purpose of these controls, however, is regulation of bank creation of money. See BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, THE FEDERAL RESERVE SYSTEM 15 (3d ed. 1954); SAMUELSON, *op. cit. supra* note 7, at 297.

51. SAMUELSON, *op. cit. supra* note 7, at 298-99.

maximization, these governmental restraints on the risks bankers may assume do not, to the extent the controls are not overzealous, limit rational competitive behavior. The ideal profit maximizer would restrain himself voluntarily.

Since loans provided by deposits in one bank become the deposits of a second bank available for use again as loans and so on, the entire system theoretically multiplies the volume of money by the reciprocal of the fraction of deposits retained.⁵² Attempts to maximize profits by heavy lending in boom periods when credit demand is high and risks appear low, or by niggard lending in periods of depression when credit demand is lower and risks appear greater, may introduce another problem—bank creation of money which aggravates inflationary or deflationary pressures.⁵³ A central agency, however, could attempt to control these tendencies without impairing competition among banks. Indeed, by use of its open market, reserve, and rediscount powers,⁵⁴ the Federal Reserve Board attempts to regulate the national supply of credit to “foster orderly economic growth and a stable dollar.”⁵⁵ But since Board control ends with a determination of the national credit supply,⁵⁶ and since pressures to increase or decrease interest costs are uniform through the banking systems of large regions,⁵⁷ the allocation of this credit supply can still be efficiently accomplished by competitive forces because each bank’s share of that supply will still depend upon how well it attracts business by satisfying customers.⁵⁸

Even though monetary controls do not impair competitive behavior among banks, they might be accomplished more easily or effectively through a small number of banking alternatives. Without resort to formal regulations, monetary authorities might easily convince a small group of banks to adopt a particular course of action. But just as it is easier to contact and persuade a few giant banks, it is easier for one obstinate giant to defeat the government’s policies. Moreover, it would be far easier for a small number of giant banks to act in concert and dictate their collective decisions on monetary policy to the monetary authorities.⁵⁹ In addition, to the extent that monetary policies can be effected through cost pressures rather than psychological means, a large number of banking alternatives competing to attract business by satisfying customers

52. For detailed explanation of bank money creation, see *id.* at 299-308; HART, *op. cit. supra* note 5, at 64-70; BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *op. cit. supra* note 50, at 21-25.

53. See HART, *op. cit. supra* note 5, at 35.

54. See BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *op. cit. supra* note 50, at 31-55.

55. *Id.* at 1.

56. See *id.* at 11.

57. Since Federal Reserve policy is implemented through regional banks in twelve districts, *id.* at 71-77, within these districts changes in lending costs, resulting, for example, from changes in rediscounting costs, will be uniform. Moreover, since regional Reserve Bank decisions affecting lending costs are reviewed by the Board of Governors in Washington, *id.* at 77-78, monetary policy is likely to be uniform throughout the country.

58. FEDERAL RESERVE BOARD, *op. cit. supra* note 12, at 431 (1958).

59. The charge that regulatory agencies become the captive of the industry regulated is often repeated; see GELLHORN & BYSE, ADMINISTRATIVE LAW 27-28 (remarks of Warner

seems desirable, at least in inflationary periods. Since banks behaving competitively presumably have lower profits than banks under less customer pressure, changes, especially increases, in the cost of additional lending have a greater effect on profit margins, which in turn influence output decisions.⁶⁰ Where a bank has a cushion of monopoly profit, it is not as imperative that it change its output to adjust to changes in cost, and even if it is maximizing profits, it may believe that immediate price and output adjustments may hurt long run profits.⁶¹ In deflationary periods, however, where cost is to act as an inducement rather than a restraint on bank activities, and where all banks are reluctant to lend for reasons of risk not cost, it might be easier for the monetary authority to "tell" a few banks to lend. Since it is arguable that psychological controls are better effected through a few banks, but it seems likely competitive banks are more responsive to cost controls, there is little reason to conclude that monetary policy would be better effected through fewer banking alternatives.

In sum, therefore, neither the nature of banks and the money market nor banking regulation to control solvency and money creation offer any strong reasons that the industry should not provide bank-users enough alternatives so that their choice will effectively induce efficient bank operation and resource allocation. And, thus, the congressional policy that "competition is desirable in banking"⁶² would appear to encounter no serious obstacles.

ENTRY AND BRANCHING

Bank structure may be expanded by entrance of new banks or by branching of existing banks. Since both processes may increase consumer alternatives, charter and branching statutes are discussed together.

To minimize bank failures, bank supervisory agencies limit entry to banks capable of generating consistent profits.⁶³ Minimum amounts of invested capital are required⁶⁴ to cushion losses on bank assets.⁶⁵ In addition, the prospective entrant must have retained management qualified to conduct profitable opera-

W. Wagner), 40 (remarks of Thurman Arnold), 69 (remarks of Professor Marvin H. Bernstein), 76-78 (remarks of Professor Louis J. Jaffe) (1960); see also S. REP. No. 196, 86th Cong., 1st Sess. 25-29 (1959).

60. Cf. Hodgman, *supra* note 36, at 267-68.

61. See ALHADEFF, *op. cit. supra* note 3, at 168-70.

62. See note 1 *supra*.

63. See *Schaake v. Dolley*, 85 Kan. 598, 118 Pac. 80, 84 (1911); *State ex rel. Dodd v. Hill*, 84 W. Va. 437, 100 S.E. 286, 288 (1919). There has been a long time history of political conflict between state and federal chartering authorities, see ECONOMIC POLICY COMMISSION OF THE AMERICAN BANKERS ASSOCIATION, *op. cit. supra* note 38, which has interfered with their espoused purposes. For evidence that this conflict is not yet over, see *Leuhrs v. Spaulding*, 80 Idaho 326, 328 P.2d 582 (1958); KAN. GEN. STAT. ANN. § 9-1802 (4) (1950).

64. See, e.g., 31 Stat. 48 (1900), as amended, 12 U.S.C. § 51 (1958) (national banks).

65. FREEMAN, *THE PROBLEMS OF ADEQUATE BANK CAPITAL* 11 (1952).

tions.⁶⁶ While there has been some criticism of the amounts of capital required⁶⁷ or the method of ascertaining the capabilities of prospective management,⁶⁸ that these factors are relevant in minimizing the probability of failure is undisputed.⁶⁹

In addition to the applicant's qualifications, banking authorities investigate the entrant's prospective market. Since solvency is a function of profitability, and profitability a function of business transacted,⁷⁰ both state and federal statutes permit entry only when a bank can develop sufficient business to cover costs plus a reasonable profit.⁷¹ The most explicit provisions require the applicant bank to have prospects of "sufficient business,"⁷² "successful operations,"⁷³ or favorable earnings.⁷⁴ Others approach the problem from the consumer's perspective, requiring proof of "public necessity,"⁷⁵ "public need,"⁷⁶ "public demand,"⁷⁷ or that a community can support a new bank,⁷⁸ or, more obliquely,

66. See, e.g., 12 C.F.R. § 4.1(b) (1959) (Comptroller of the Currency must consider "the general character of its management").

67. See generally FREEMAN, *op. cit. supra* note 65.

68. See Application of Millburn-Short Hills Bank, 59 N.J. Super. 470, 476-77, 158 A.2d 66, 68-69 (1959); Application of State Bank of Plainfield, 61 N.J. Super. 150, 159-60, 160 A.2d 299, 304 (1960).

69. O'CONNOR, BANKS UNDER ROOSEVELT 81-82 (1938) (incompetent management given 32% of time as reason for bank failure between 1865 and 1936); WHITTLESEY, BANKING AND THE NEW DEAL 2 (1935); ECONOMIC POLICY COMMISSION, AMERICAN BANKERS ASSOCIATION, THE BANK CHARTERING HISTORY AND POLICIES OF THE UNITED STATES 33-43 (1935); Liang, The Banking Structure of the United States in the Twentieth Century, 1952, p. 184 (unpublished thesis in Catholic University of America library); see Floyd v. Thornton, 68 S.E.2d 334 (1951).

70. ECONOMIC POLICY COMMISSION, *op. cit. supra* note 69, at 39.

71. See Stokes, *Public Convenience and Advantage in Applications for New Banks and Branches*, 74 BANKING L.J. 921 (1957).

72. See ALA. CODE ANN. tit. 5, § 86 (1960); KY. REV. STAT. ANN. § 287.050 (1955); ME. REV. STAT. ch. 59, § 19-B (Supp. 1959); MO. ANN. STAT. § 362.030 (Supp. 1960); N.C. GEN. STAT. ANN. § 53-4 (Supp. 1959); ORE. REV. STAT. § 707.030 (1959); TEX. REV. CIV. STAT. ANN. §§ 342-345 (1959).

73. See CONN. GEN. STAT. § 36-53(7) (1960); FLA. STAT. ANN. § 659.03 (Supp. 1960); MICH. STAT. ANN. § 23.754 (1957); N.J. STAT. ANN. § 17:9A-11 (1950).

74. See ILL. ANN. STAT. ch. 16½, § 110 (Smith-Hurd Supp. 1960); OKLA. STAT. ANN. tit. 6, § 55 (1951); WYO. STAT. ANN. § 13-44 (1959); 13 Stat. 102 (1864), as amended, 12 U.S.C. § 27 (1958), 12 C.F.R. § 4.1(b) (1959).

75. See ALA. CODE ANN. tit. 5, § 86 (1960); ARIZ. REV. STAT. ANN. § 6-201(A) (1956); ARK. STAT. ANN. § 67-303 (1957); IND. STAT. ANN. § 18-225 (Supp. 1960); KAN. GEN. STAT. ANN. § 9-1802 (1950); MICH. STAT. ANN. § 23.754 (1957); NEB. REV. STAT. ANN. § 8-129 (Supp. 1958); OKLA. STAT. ANN. tit. 6, § 55 (1951); TEX. REV. CIV. STAT. ANN. § 342-305 (1959); VA. CODE ANN. § 6-31 (1949).

76. See ARK. STAT. ANN. § 67-205 (1957); CAL. FINANCIAL CODE ANN. § 361(b); CONN. GEN. STAT. § 36-53(7)(c) (1960); FLA. STAT. ANN. § 659.03 (Supp. 1960); GA. CODE ANN. § 13-905 (Supp. 1958); N.D. CENT. CODE 6-02-06 (1960); VA. CODE ANN. § 6-31 (1949).

77. See MINN. STAT. ANN. § 45.04 (Supp. 1960); N.C. GEN. STAT. ANN. § 53-4 (Supp. 1959).

78. See FLA. STAT. ANN. § 659.03 (Supp. 1960); N.M. STAT. ANN. § 48-2-5 (1954); PA. STAT. ANN. tit. 7, § 819-306 (1939); WASH. REV. CODE ANN. § 30.08.030 (1959).

that the public convenience and advantage will be served.⁷⁹ While most statutes focus on the applicant bank's own prospects,⁸⁰ some inquire whether its expected business will come from other banks, impairing their condition,⁸¹ or whether existing banks are providing adequate service in the area.⁸²

These statutes allocate to state and federal banking authorities responsibility for factual determinations,⁸³ requiring degrees of precision varying from such specific economic indicia of profitable operation⁸⁴ as retail sales in the area to such general criteria as "good and sufficient reasons,"⁸⁵ the "general good,"⁸⁶ the "best interest of the public,"⁸⁷ and that the bank is "justified."⁸⁸ Notwithstanding these verbal differences, one survey of state banking supervisors revealed that prospects of profitable operations were the key determinants;⁸⁹ competition was much less important, influencing a decision only when it would endanger existing banks⁹⁰ or counteract a monopolistic market.⁹¹ Another survey indicated that an applicant is expected to show potential deposit generation of \$1,000,000 to \$3,000,000 during the first three years.⁹² Usually the

79. See CAL. FINANCIAL CODE ANN. § 362(a); DEL. CODE ANN. tit. 5, § 726 (1953); FLA. STAT. ANN. § 659.03 (Supp. 1960); GA. CODE ANN. § 13-905 (Supp. 1958); HAWAII REV. LAWS § 178-16 (1955); KY. REV. STAT. ANN. § 287.050 (1955); ME. REV. STAT. ch. 59, § 19-B (Supp. 1959); MD. ANN. CODE art. 11, § 30 (1957); MASS. ANN. LAWS ch. 168, § 78 (1959); MO. ANN. STAT. § 363.030 (Supp. 1960) ("convenience and needs"); MONT. REV. CODE ANN. § 5-202 (1957); NEB. REV. STAT. ANN. § 8-129 (Supp. 1958); N.J. STAT. ANN. § 17:9A-11 (1950) (public advantage); N.Y. BANKING LAW § 24; ORE. REV. STAT. § 707.080(f) (1959); PA. STAT. ANN. tit. 7, § 819-306 (1939); R.I. GEN. LAWS ANN. § 19-1-9 (1957); S.D. CODE § 6.0304 (1939) ("public convenience and necessity"); TENN. CODE ANN. § 45-206 (1955); WIS. STAT. ANN. § 221.01(5) (1957); WYO. STAT. ANN. § 13-44 (1959) ("convenience and needs"); 13 Stat. 102 (1864), as amended, 12 U.S.C. § 27 (1958), 12 C.F.R. § 4.1(b) (1959) ("convenience and needs").

80. See, e.g., HAWAII REV. LAWS § 178-16 (1955).

81. See MISS. CODE ANN. § 5160(a) (1957); MO. ANN. STAT. § 362.030 (Supp. 1960); NEV. REV. STAT. § 659.040 (1959); N.M. STAT. ANN. § 48-2-5 (1953); UTAH CODE ANN. § 7-1-26 (1953). Cf. ALASKA COMP. LAWS ANN. § 34-1-196 (Supp. 1958); COLO. REV. STAT. ANN. § 14-19-10 (Cum. Supp. 1957).

82. See CAL. FINANCIAL CODE ANN. § 361(b); FLA. STAT. ANN. § 659.03(b) (Supp. 1960); GA. CODE ANN. § 13-905 (Supp. 1958); NEV. REV. STAT. § 659.040 (1959); TENN. CODE ANN. § 45-206 (1955); WIS. STAT. ANN. § 221.01(5) (1957).

83. Stokes, *supra* note 71.

84. See CAL. FINANCIAL CODE ANN. § 361(c)(3); CONN. GEN. STAT. § 36-53(7) (1960); GA. CODE ANN. § 13-905 (Supp. 1958); MISS. CODE ANN. § 5160(a) (1957); TENN. CODE ANN. § 45-206 (1955); WIS. STAT. ANN. § 221.01(5) (1957).

85. See UTAH CODE ANN. § 7-1-26 (1953).

86. See VT. STAT. ANN. tit. 8, § 336 (1958).

87. See OHIO REV. CODE ANN. § 1103.06 (1954); cf. S.C. CODE ANN. § 8-57 (Supp. 1960).

88. ORE. REV. STAT. § 707.080 (1959).

89. S. Doc. No. 123, 82d Cong., 2d Sess., pt. 2, 989 (1952).

90. *Ibid.*

91. *Id.* at 993.

92. Stokes, *supra* note 71, at 931 n.41, 938-39; see also *Suburban Bank v. Jackson County State Bank*, 330 S.W.2d 183, 187 (1959). The following cases review in detail

banking agencies arrive at a basis for decision by *ex parte* investigations;⁹³ some states, however, require a public hearing.⁹⁴ Several statutes do not specifically provide for judicial scrutiny of these administrative determinations,⁹⁵ but review seems possible if general administrative procedure acts are operative.⁹⁶ Where review is provided for, it may be by a court,⁹⁷ a board,⁹⁸ or a state executive council.⁹⁹ Standing would seem limited to unsuccessful applicants,¹⁰⁰ but competing banks have occasionally obtained review of a charter authorization.¹⁰¹ In a few states, review is either explicitly prohibited,¹⁰² or is available only when the banking agency fails to disclose its reasons for denial.¹⁰³ With the exception of a few statutes providing for a trial *de novo* rather than judicial review,¹⁰⁴ an agency's factual findings are conclusive.¹⁰⁵

the scope of various banking authorities' investigations and the relevance of various criteria: State Banking Bd. v. McCulloch, 316 S.W.2d 259 (Tex. Civ. App. 1958); Moran v. State Banking Comm'r, 322 Mich. 230, 33 N.W.2d 772 (1948); State v. State Sec. Comm'n, 145 Minn. 221, 176 N.W. 759 (1920); Wall v. Fenner, 76 S.D. 252, 76 N.W.2d 722 (1956).

93. S. Doc. No. 123, 82d Cong., 2d Sess., pt. 2, 990 (1952).

94. *Id.* at 991; see also HAWAII REV. LAWS § 178-16 (1955); IND. STAT. ANN. § 18-223 to -224 (Supp. 1960); MASS. ANN. LAWS ch. 168, § 78 (1959); MINN. STAT. ANN. § 45.04 (Supp. 1960); MISS. CODE ANN. § 5160(a) (1957); N.D. CENT. CODE § 6-02-05 (1960); OKLA. STAT. ANN. tit. 6, § 55; R.I. GEN. LAWS ANN. § 19-1-5 (1957); VT. STAT. ANN. tit. 8, § 335 (1958).

95. See, e.g., ALA. CODE ANN. tit. 5, § 86 (1960).

96. See, e.g., TENN. CODE ANN. §§ 45-208, 27-901 to -913 (1955); see also Du Bose v. Gormley, 189 Ga. 321, 5 S.E.2d 909 (1959); Pue v. Hood, 222 N.C. 310, 22 S.E.2d 896 (1942); Persons v. Mashburn, 211 Ga. 477, 86 S.E.2d 319 (1955) (review by mandamus). *But see* Natick Trust Co. v. Board of Bank Incorporation, 337 Mass. 615, 151 N.E.2d 70 (1958). Compare Moran v. State Banking Comm'r, 322 Mich. 230, 248-49, 33 N.W.2d 772, 780 (1948).

97. MICH. STAT. ANN. §§ 23.739, 23.754 (1943); MISS. CODE ANN. § 5160(b) (1957); MO. ANN. STAT. § 361.095 (Supp. 1960); NEV. REV. STAT. § 659.060 (1960); N.H. REV. STAT. ANN. ch. 396, § 8 (1955); N.C. GEN. STAT. ANN. § 53-92 (1960); VA. CODE ANN. § 6-32 (1949).

98. See MO. ANN. STAT. § 362.040 (Supp. 1960); N.Y. BANKING LAW § 24; ORE. REV. STAT. § 707.150 (1959); UTAH CODE ANN. § 7-1-26 (1953).

99. IOWA CODE ANN. § 524.12 (1949).

100. See MICH. STAT. ANN. § 23.754 (1943) ("applicants . . . aggrieved"); MISS. CODE ANN. § 5160(b) (1957) ("prospective incorporators . . . aggrieved").

101. See Application of Millburn-Short Hills Bank, 59 N.J. Super. 470, 158 A.2d 66 (1959); Application of State Bank of Plainfield, 61 N.J. Super. 150, 160 A.2d 299 (1960); *cf.* National Bank of Detroit v. Wayne Oakland Bank, 252 F.2d 537, 544 (6th Cir. 1958), *cert. denied*, 358 U.S. 830 (1958).

102. See WYO. STAT. ANN. § 13-44 (1959); see also DEL. CODE ANN. tit. 5, § 726 (1953) (no review of adverse decision).

103. See N.J. STAT. ANN. § 17: 9A-15 (Supp. 1960); *but cf.* note 101 *supra* and accompanying text. Compare McKinnon v. State Banking Comm'n, 103 N.W.2d 179 (S.D. 1960).

104. See CONN. GEN. STAT. § 36-27 (1958); NEV. REV. STAT. § 659.060 (1959); WASH. REV. CODE ANN. § 30.08.040 (1959).

105. See, e.g., ALASKA COMP. LAWS ANN. § 34-1-55 (1958); see also Planters Bank v. Barrott, 239 Miss. 248, 122 So. 2d 256 (1960).

In reviewing an agency's decision, most courts have affirmed, relying heavily on the former's expertise.¹⁰⁶ Although nearly all charter statutes fail to specify the relevance of competition,¹⁰⁷ a few courts have stressed its importance,¹⁰⁸ even to the extent of reversing an agency. In *Moran v. Nelson*,¹⁰⁹ for example, the Michigan Supreme Court ordered the State Banking Commissioner to issue a bank charter to a Detroit applicant. In reviewing the area's economic conditions, the court noted that the six existing banks had consistently been permitted to accommodate increased demand by establishing new branches.¹¹⁰ Specifically overruling the Commissioner's determination that the term "necessity" in the statute meant "absolute need,"¹¹¹ the court said that adequacy of existing facilities was not conclusive¹¹² since the charter statute should be applied "not to deter competition or foster monopoly, but to guard the public and public interest against imprudent banking."¹¹³ Moreover, as the Commissioner had made no finding that the new bank would be unprofitable, his decision could not be justified on solvency grounds.¹¹⁴

The *Moran* decision suggests that banking agencies may be oversolicitous in protecting existing banks from competition.¹¹⁵ But this result should be avoided if customers are to have sufficient banking alternatives. Arguably, a public hearing would provide a control against arbitrary agency action.¹¹⁶ Since the issue is charter of a new bank, the usual banking agency reason for opposing public hearings—fear that public disclosure of an existing bank's condition might cause a run¹¹⁷—might seem inapplicable. But since existing banks would

106. See, e.g., *State v. State Sec. Comm'n*, 145 Minn. 221, 176 N.W. 759 (1920); *Pue v. Hood*, 222 N.C. 310, 22 S.E.2d 896 (1942); *Wall v. Fenner*, 76 S.D. 252, 76 N.W.2d 722 (1956); *State Banking Bd. v. McCulloch*, 316 S.W.2d 259 (Tex. Civ. App. 1958).

107. But see TENN. CODE ANN. § 45-206 (1955) and WIS. STAT. ANN. § 221.01(5) (1957).

108. *Wall v. Fenner*, 76 S.D. 252, 76 N.W.2d 722, 725 (1956); *Suburban Bank v. Jackson County State Bank*, 330 S.W.2d 183, 187 (Mo. Ct. App. 1959); *Application of State Bank of Plainfield*, 61 N.J. Super. 150, 160 A.2d 299, 305 (1960); *Application of Howard Sav. Institution of Newark*, 32 N.J. 29, 159 A.2d 113, 124-25 (1960); *State v. State Sec. Comm'n*, 145 Minn. 221, 176 N.W. 759, 760 (1920).

109. 322 Mich. 230, 33 N.W.2d 772 (1948).

110. *Id.* at 241-42, 33 N.W.2d at 777.

111. *Ibid.*

112. 322 Mich. at 243, 33 N.W.2d at 778. See also *Wall v. Fenner*, 76 S.D. 252, 76 N.W.2d 722, 726 (1956); *Suburban Bank of Kansas City v. Jackson County State Bank*, 330 S.W.2d 183, 187 (Mo. Ct. App. 1959).

113. 322 Mich. at 243, 33 N.W.2d at 778.

114. *Id.* at 246-48, 33 N.W.2d at 779-80.

115. In one state, the banking supervisor must have been recommended by the state bankers' association; TENN. CODE ANN. § 45-102 (1955). For other indications that bank administrators may be influenced by the industry, see S. REP. No. 196, 86th Cong., 1st Sess. 25-29 (1959) and S. Doc. No. 123, 82d Cong., 2d Sess., pt. 2, 989-95 (1952). Cf. COMMISSION ON MONEY & CREDIT, MONEY AND CREDIT 165 (1961).

116. See note 94 *supra*.

117. See 105 CONG. REC. 8137-38 (1959). Even if the bank's deposits were insured by the FDIC, a failure caused by a run would injure depositors. Amounts above \$10,000 are

have to expose their borderline financial condition in order to show the detriment of a new bank's entry, the fear of customer reaction may deter such banks from providing the disclosure essential to the bank supervisor's determination.

But even if a public hearing is undesirable, bank charter statutes might specifically require consideration of competition, or at least declare it to be the preferred banking structure to the extent consistent with bank solvency.¹¹⁸ Moreover, by requiring that an agency consider other banks only when a prospective entrant might render their failure predictable, these statutes could minimize the monopolistic effect which limited entry has upon displacing existing banks. Agency activity could be more effectively policed in most states either by statutory reference to the economic indicia relevant to predicting an applicant's profitability and the failure of existing banks,¹¹⁹ or by requiring agency promulgation of regulations governing its inquiry.¹²⁰ With these changes, bank charter statutes would foster the number of alternatives necessary for competitive behavior. But it is doubtful that bank entry would significantly increase since, except in a few areas,¹²¹ very few charter applications have been made in recent years.¹²² State banking officials have suggested that impediments are primarily economic, not legal, pointing to low bank stock prices caused by bad profit prospects, and to the complete networks of financial institutions in their states.¹²³ Where entry is economically attractive, however, improved charter statutes would facilitate a structure more conducive to competitive behavior.

This analysis applies with greater force to statutes regulating one type of branch banking—where branching is accomplished by the creation of new, rather than the acquisition of existing, banking units. Establishment of branch banks is subject to administrative approval, and the standards applied are usually identical or quite similar to those governing bank charter.¹²⁴ But since branches appear to cost less to operate than small unit banks,¹²⁵ and consequently require less capital¹²⁶ and fewer deposits¹²⁷ for profitable operation,

not insured, 68 Stat. 873 (1950), 12 U.S.C. § 1821(a) (1957), and even if the funds are covered by insurance, the process of claim filing, 64 Stat. 873 (1950), 12 U.S.C. § 1821(f) (1958), 12 C.F.R. § 305.1 (1959), may impair their availability for some time.

118. Cf. ILL. ANN. STAT. ch. 16½, § 71 (Smith-Hurd Supp. 1960) ("It is held to be in the public interest that competition prevail in the banking system . . .").

119. See note 84 *supra*.

120. Cf. Berle, *Banking Under the Anti-trust Laws*, 49 COLUM. L. REV. 589, 597-98 (1949).

121. S. Doc. No. 123, 82d Cong., 2d Sess., pt. 2, 996 (1952) (statement of J.M. Falkner of Texas).

122. *Id.* at 995.

123. *Ibid.*

124. Stokes, *Public Convenience and Advantage in Applications for New Banks and Branches*, 74 BANKING L.J. 921, 926-27 (1957); see also *Upper Darby Nat'l Bank v. Myers*, 386 Pa. 12, 124 A.2d 116 (1956).

125. ALHADEFF, *MONOPOLY AND COMPETITION IN BANKING* 102-05 (1954).

126. CHAPMAN & WESTERFIELD, *BRANCH BANKING* 277 (1942).

127. See note 124 *supra*.

branch establishment is possible in less populous or more heavily banked areas where unit bank charter would be precluded.¹²⁸ Thus, in addition to adopting the standard of competition suggested for bank charter approval, statutes and administrative bodies should take into account that the lower operating costs of branch banking may increase consumer alternatives significantly.¹²⁹

Several states prohibit branch banking¹³⁰ or limit the location of a branch to the county,¹³¹ county and contiguous counties,¹³² or a zone surrounding its home office.¹³³ Apart from subjective arguments praising the virtue of local control,¹³⁴ most critics find branch banking objectionable because it increases concentration, thereby decreasing competition, either by absorbing independent banks or by driving such banks out of business.¹³⁵ Theoretically, lower cost branch banks could force the failure of higher cost unit banks without resort to predatory tactics.¹³⁶ In practice, however, this has not occurred.¹³⁷ While this behavior indicates that branch banks have not benefited consumers by reducing prices, these branches nevertheless provide additional credit sources for marginal risk borrowers¹³⁸ in addition to competing in services. Moreover, while absorption by merger has been the primary instrument of branch bank growth,¹³⁹ outright prohibitions or geographic limitations go too far because

128. ALHADEFF, *op. cit. supra* note 125, at 105 n.54; Stokes, *supra* note 124, at 927; CHAPMAN & WESTERFIELD, *op. cit. supra* note 126, at 279-83.

129. CHAPMAN & WESTERFIELD, *op. cit. supra* note 126, at 279-83. See also COMMISSION ON MONEY & CREDIT, *op. cit. supra* note 115, at 165.

130. FLA. STAT. ANN. § 659.06 (Supp. 1960); ILL. ANN. STAT. ch. 16½, § 106 (Smith-Hurd Supp. 1960); KAN. GEN. STAT. ANN. § 9-1111 (Supp. 1959); MINN. STAT. ANN. § 48.34 (1946); MONT. REV. CODES ANN. § 5-1028 (1957); NEB. REV. STAT. ANN. § 8-1,105 (1954); OKLA. STAT. ANN. tit. 6, § 461 (Supp. 1960); TEX. CONST. art. 16, § 16, TEX. REV. CIV. STAT. ANN. § 342-903 (1959); W. VA. CODE ANN. § 3131 (1955); WIS. STAT. ANN. § 221.04(f) (Supp. 1961).

131. IND. STAT. ANN. § 18-1707 (Supp. 1961); N.J. STAT. ANN. § 17:9A-19 (Supp. 1960); TENN. CODE ANN. § 45-211 (1955); VA. CODE ANN. § 6-26 (Supp. 1960).

132. See ARK. STAT. ANN. § 67-319 (1957); IOWA CODE ANN. § 528.51 (Supp. 1960); ME. REV. STAT. ANN. ch. 59, § 19-c (Supp. 1959); N.M. STAT. ANN. § 48-2-17 (1954); N.D. CENT. CODE § 6-03-14 (1960); OHIO REV. CODE ANN. § 1103.09 (1954).

133. See HAWAII REV. LAWS § 178-39 (Supp. 1960); N.M. STAT. ANN. § 48-2-17 (1954).

134. COLLINS, THE BRANCH BANKING QUESTION 9 (1926); CHAPMAN & WESTERFIELD, *op. cit. supra* note 126, at 216-28.

135. COLLINS, *op. cit. supra* note 134, at 8-9; see also Dauphin Deposit Trust Co. v. Myers, 388 Pa. 444, 454-55, 130 A.2d 686, 691 (1957) (when large bank acquires small bank as branch "a pygmy has become a giant . . . and the effect . . . is not substantially different from what would occur if a giant were established as a branch where no pygmy had theretofore existed.").

136. ALHADEFF, *op. cit. supra* note 125, at 107.

137. *Id.* at 207-08, 216. See also COMMISSION ON MONEY & CREDIT, *op. cit. supra* note 115, at 165.

138. See notes 12 & 13 *supra* and accompanying text.

139. Several branching statutes require or prefer this method of growth, presumably for solvency reasons: substitution of a branch for a bank cannot overbank an area. CONN. GEN. STAT. § 36-59 (1960); IDAHO CODE ANN. § 26-1001 (Supp. 1961); KY. REV. STAT.

they arbitrarily deny the public the increased alternatives in areas where a bank has no other branches. Merger statutes, discussed in succeeding sections, could preserve competition more effectively by outlawing only the alternative-reducing transactions which affect competition.

CONCENTRATION

Banking concentration—decreasing the number of independent alternatives¹⁴⁰—may be effected by three means: liquidation, holding company acquisition, and merger. Although liquidation reduced the bank population by almost 50 per cent in the 1920's and 1930's,¹⁴¹ few banks have left the industry by this means in recent years.¹⁴² Banking concentration through the other two means, however, has increased markedly.¹⁴³ The succeeding sections attempt to describe and evaluate the laws governing these transactions.

The Statutes

Bank Holding Companies

A bank holding company is a business unit which holds the controlling stock interests of commercial banks.¹⁴⁴ By stock acquisition of competing banks, a single company can eliminate independence of action, thereby increasing banking concentration.¹⁴⁵ While the banking subsidiaries remain independently chartered and possess a degree of autonomy,¹⁴⁶ holding companies exercise continued control over the more important managerial decisions such as promotion of senior officers.¹⁴⁷ In 1957, 44 registered holding companies controlled 417 unit banks, having 851 branches.¹⁴⁸ These companies accounted for 5.9 per cent of all banking offices and 7.5 per cent of all deposits.¹⁴⁹

In 1956, Congress responded to a seventeen year effort¹⁵⁰ to bring bank holding company operation and expansion under control. The federal statute¹⁵¹ provides for holding company registration¹⁵² and examination,¹⁵³ and pro-

ANN. § 287.180 (1955); MASS. ANN. LAWS ch. 168, § 5 (1959); PA. STAT. ANN. tit. 7, § 819-204.1 (Supp. 1960); UTAH CODE ANN. § 7-3-6 (Supp. 1959); WASH. REV. CODE ANN. § 30.40.020 (1955). One state offers the alternative of gaining the consent of all existing banks in the area in which a branch is sought to be located; IDAHO CODE ANN. § 26-1001 (Supp. 1961).

140. CHAPMAN, CONCENTRATION OF BANKING 5 (1934).

141. GOLDSCHMIDT, THE CHANGING STRUCTURE OF AMERICAN BANKING 206 (1933).

142. Between 1950 and 1959 only 98 banks have discontinued business. H.R. REP. NO. 1416, 86th Cong., 2d Sess. 4 (1960).

143. See NADLER & BOGEN, THE BANK HOLDING COMPANY 20, chart III (1960).

144. NADLER & BOGEN, *op. cit. supra* note 143, at 5, 13 (1959).

145. See S. REP. NO. 1095, 84th Cong., 1st Sess. 2 (1955).

146. NADLER & BOGEN, *op. cit. supra* note 143, at 5.

147. *Id.* at 22-23.

148. *Id.* at 14.

149. *Ibid.*

150. For review of previous bills see S. REP. NO. 1095, 84th Cong., 2d Sess. 4 (1955).

151. 70 Stat. 133-39 (1956), as amended, 12 U.S.C. §§ 1841-48 (1958).

152. 70 Stat. 137 (1956), 12 U.S.C. § 1844(a) (1958).

153. 70 Stat. 137 (1956), 12 U.S.C. § 1844(c) (1958).

scribes certain self-dealing transactions between holding companies and their subsidiaries.¹⁵⁴ It requires divestiture of non-banking interests¹⁵⁵ and Federal Reserve Board approval of future banking acquisitions and holding company mergers.¹⁵⁶ In granting or denying approval of acquisitions or mergers, the Board is to take into consideration the following factors:

(1) The financial history and conditions of the company or companies and the banks concerned; (2) their prospects; (3) the character of their management; (4) the convenience, needs, and welfare of the communities and the area concerned; and (5) whether or not the effect of such acquisition or merger or consolidation would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.¹⁵⁷

The Board must request recommendations from the Comptroller of the Currency on the applications for acquisitions of national banks, or from the appropriate state banking authorities for state bank acquisitions.¹⁵⁸ If such recommendations oppose approval, the Board must hold a public hearing on the application.¹⁵⁹ Aggrieved parties may obtain judicial review of any Board decision.¹⁶⁰

A paucity of legislative history discussing the criteria governing holding company acquisitions¹⁶¹ has left the Board with little guidance in its determinations. As a result the sole source of authoritative interpretation of these vague provisions is the Board's forty-six decisions.¹⁶²

The first three criteria—financial history and condition, prospects, and character of management—were included to require a solvency evaluation of both the applicant company and the acquisition.¹⁶³ The statute requires the Board to compare the financial condition of the applicant with that of the proposed acquisition to determine whether the acquisition would jeopardize "the safety of the depositor's funds."¹⁶⁴ This procedure may accomplish the rescue of failing banks by solvent holding companies, and prevent acquisition of healthy banks by unsound holding company systems. Thus far, the Board has apparent-

154. 70 Stat. 137 (1956), 12 U.S.C. § 1845 (1958).

155. 70 Stat. 135 (1956), 12 U.S.C. § 1843 (1958).

156. 70 Stat. 134 (1956), 12 U.S.C. § 1842 (1958).

157. 70 Stat. 134 (1956), 12 U.S.C. § 1842(c) (1958).

158. 70 Stat. 134 (1956), 12 U.S.C. § 1842(b) (1958).

159. *Ibid.*

160. 70 Stat. 138 (1956), as amended, 12 U.S.C.A. § 1848 (Supp. 1960).

161. Most Congressional debate centered on the problem of divestment of non-banking assets. Although the Senate report intimates that concern over undue holding company concentration prompted the bill, S. REP. NO. 1095, 84th Cong., 1st Sess. 10 (1955), only three sentences are devoted to the competitive provisions; and the original House bill, H.R. 6227, 84th Cong., 1st Sess. (1955), contained no such provision.

162. These decisions are reported in the *Federal Reserve Bulletin*.

163. S. REP. NO. 1095, 84th Cong., 1st Sess., pt. 1, 10 (1955).

164. *Ibid.*

ly had little opportunity to effect these objectives; in nearly every case it has found the condition, prospects, and management of both the holding company and the proposed acquisition "satisfactory," indicating that the transaction would have no appreciable effect on deposit safety.¹⁶⁵ In one case, however, the Board found that the proposed acquisition had a management succession problem which might imperil the bank's solvency when its senior officers retired.¹⁶⁶ The Board approved the acquisition even though the transaction substantially increased the holding company's share of deposits and banking offices in the area. On occasion, the Board has mentioned that a transaction would enable a bank to obtain additional capital more easily,¹⁶⁷ but in no case have solvency considerations demonstrated need for such capital.

Since a holding company may simply possess the stock of an acquisition, it would seem that the Board could rarely justify an acquisition on the basis of the fourth factor—"the convenience, needs and welfare of the . . . area concerned." Holding companies often promise to shower a proposed acquisition with such benefits as improved management,¹⁶⁸ but they are under no obligation to follow through.¹⁶⁹ In a surprising number of cases, however, the Board has approved acquisitions on the basis of such promises, even when some competition would be eliminated. The importance attributed to the "convenience, needs and welfare" factor has varied with the fact situations. Where, for example, the proposed acquisitions were chartered banks not yet in operation planning to do business in areas having no immediate banking facilities, the Board has invariably approved the acquisition as a means of providing the area with needed banking services.¹⁷⁰ But where banking facilities were available and the holding company had another subsidiary in the area, the acquisition of a bank not yet in operation has been disapproved because it would have an adverse effect on competition in the area.¹⁷¹ The Board has given considerable weight to promises of increased loan limits to individual borrowers¹⁷² and

165. See, e.g., *Farmers & Merchants Trust Co.*, 46 FED. RESERVE BULL. 14 (1960). See also *First Virginia Corp.*, 47 FED. RESERVE BULL. 1036 (1961).

166. *Northwest Bancorporation*, 45 FED. RESERVE BULL. 147, 148-49 (1959).

167. *First Virginia Corp.*, 45 FED. RESERVE BULL. 8, 9 (1959); *Marine Corp.*, 45 FED. RESERVE BULL. 1132, 1133 (1959); *Bank Stock Corp. of Milwaukee*, 45 FED. RESERVE BULL. 1133, 1135 (1959); *Central Wisconsin Bankshares, Inc.*, 47 FED. RESERVE BULL. 760, 761 (1961).

168. *First Bank Stock Corp.*, 46 FED. RESERVE BULL. 486 (1960).

169. To date no Board orders have been conditional. For an indication of the range of differences in holding—subsidiary relations which may result, see NADLER & BOGEN, *THE BANK HOLDING COMPANY* 24-29 (1959).

170. *Atlantic Nat'l Bank and Atl. Trust Co.*, 45 FED. RESERVE BULL. 1353 (1959); *First Wisconsin Bankshares Corp.*, 46 FED. RESERVE BULL. 266 (1959); *Marine Corp.*, 46 FED. RESERVE BULL. 1338 (1960); *Atlantic Nat'l Bank and Atl. Trust Co.*, 47 FED. RESERVE BULL. 917 (1961).

171. *First Bank Stock Corp.*, 44 FED. RESERVE BULL. 1061 (1958). See also *Northwest Bancorporation*, 47 FED. RESERVE BULL. 919 (1961) (proposed state bank which would be independent preferred).

172. *Baystate Corp.*, 44 FED. RESERVE BULL. 13 (1958). The amount lent to any one

offers of state-wide banking services,¹⁷³ notwithstanding its recognition that these benefits could be achieved by smaller banks through their correspondent banks.¹⁷⁴ To a lesser extent, the Board has been impressed with promises to offer a wider range of banking services,¹⁷⁵ to improve management,¹⁷⁶ and to provide additional capital to keep pace with the growth of the area served.¹⁷⁷

In applying the fifth criterion—whether the effect of an acquisition “would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest and the preservation of competition in the field of banking”—the Board has touched on “adequate and sound banking,” ignored “the public interest” as an independent consideration, and intensively examined “the preservation of competition.” Since the statute’s first three criteria presumably test the solvency of the holding company and the acquisition, the “adequate and sound banking” factor has been construed to mean the transaction’s effects on other banks. A finding that the effects upon these banks would be “adverse” has prompted disapproval of the acquisition, although it is unclear what degree of impairment is required.¹⁷⁸ The Board has indicated that “the public interest” is not itself a separate consideration.¹⁷⁹ If, after a weighing of all the other factors, the Board’s decision is consistent with a reasonable resolution thereof, it is perforce in the public interest.¹⁸⁰

In considering “preservation of competition,” the Board has analyzed both the number of banks in different markets and the extent to which these banks compete. To evaluate banking structure, changes in concentration which may be caused by the proposed acquisition are first determined. The Board examines four markets surrounding the proposed acquisition: the state, the county and contiguous counties, the county itself, and a zone, called the primary service area, from which 75 per cent of the bank’s deposits are derived.¹⁸¹ Three measures of concentration are used: the number of banking offices, including branches or banks in a holding company system;¹⁸² the amount of individual, partnership and corporation deposits;¹⁸³ and the amount of all deposits.¹⁸⁴ Any

borrower is usually limited to a fixed per cent of the bank’s capital; see, *e.g.*, 34 Stat. 451 (1918), as amended, 12 U.S.C. § 84 (1958) (10% of capital for national banks).

173. Firstamerica Corp., 45 FED. RESERVE BULL. 134, 137 (1959).

174. *Id.* at 137; Marine Corp., 44 FED. RESERVE BULL. 1281, 1283 (1958).

175. New Hampshire Bankshares, Inc., 44 FED. RESERVE BULL. 432 (1958); First Security Corp., 45 FED. RESERVE BULL. 258 (1959); Firstamerica Corp., 45 FED. RESERVE BULL. 134, 137-38 (1959).

176. Firstamerica Corp., 45 FED. RESERVE BULL. 134, 136 (1959).

177. See note 167 *supra*.

178. Wisconsin Bankshares, 44 FED. RESERVE BULL. 15, 16 (1958).

179. Firstamerica Corp., 45 FED. RESERVE BULL. 134, 138-39 (1959); First New York Corp., 44 FED. RESERVE BULL. 902, 912.

180. *Ibid.*

181. See, *e.g.*, Marine Midland Corp., 46 FED. RESERVE BULL. 1228 (1960).

182. See New Hampshire Bankshares, Inc., 44 FED. RESERVE BULL. 432 (1958).

183. See, *e.g.*, Marine Corp., 44 FED. RESERVE BULL. 1283 (1958).

184. See note 181 *supra*.

increase in a concentration measure in a market is noted, but apparently the Board has drawn no outcome-determinative conclusions from this data.¹⁸⁵

Of more importance is the Board consideration given the number of alternative banking sources that would remain after the acquisition. Types of alternatives have been limited to commercial banks and mutual savings banks,¹⁸⁶ but despite close functional similarities,¹⁸⁷ savings and loan associations have been expressly disregarded on the ground that Congress did not intend their inclusion "in the banking field."¹⁸⁸ Although increased concentration may decrease competition,¹⁸⁹ applications have been approved if the consumer still can choose among a reasonable number of alternatives.¹⁹⁰ Even where the alternatives would have been substantially reduced, but the acquisition was to be merged with other banks of a large holding company in an area having a dominant bank, the Board approved on the theory that the transaction would enable the applicant to offer a wider range of services to compete with the dominant bank.¹⁹¹

In addition to its structural analysis, the Board undertakes an analysis of industry behavior to ascertain the extent to which the proposed acquisition presently competes with banks already held by the applicant. On occasion, the Board has studied the holding company's history of acquisitions to discern an anticompetitive motive.¹⁹² But the Board's primary behavioral index has been the overlap of primary service areas,¹⁹³ presumably because the transaction will eliminate one of the banking alternatives in these areas.¹⁹⁴ The amount of deposits and the number of accounts that each bank derives from the overlapping area are expressed as a percentage of their total deposits and accounts.¹⁹⁵ As with its structural analysis, the Board deems crucial the number of remaining alternatives. Where consumers would have had few alternatives other than applicant's bank, the transaction was disapproved even though applicant's bank

185. See, e.g., Bank Stock Corp. of Milwaukee, 47 FED. RESERVE BULL. 159 (1961).

186. See Baystate Corp., 44 FED. RESERVE BULL. 13 (1958); 46 FED. RESERVE BULL. 1230 (1960).

187. See notes 27 & 28 *supra* and accompanying text.

188. First Bank Stock Corp., 46 FED. RESERVE BULL. 486, 493 (1960); Northwest Bancorporation, 47 FED. RESERVE BULL. 408, 410 (1961).

189. See, e.g., Bank Stock Corp. of Milwaukee, 47 FED. RESERVE BULL. 159 (1961).

190. Marine Corp., 44 FED. RESERVE BULL. 1281, 1284 (1958); Firstamerica Corp., 45 FED. RESERVE BULL. 134, 140 (1959); Marine Corp., 45 FED. RESERVE BULL. 1132, 1133 (1959); Bank Stock Corp. of Milwaukee, 45 FED. RESERVE BULL. 1133 (1959); Atlantic Nat'l Bank and Atl. Trust Co., 45 FED. RESERVE BULL. 1353 (1959); First Virginia Corp., 46 FED. RESERVE BULL. 617 (1960); Bank Stock Corp. of Milwaukee, 47 FED. RESERVE BULL. 159 (1961); Marine Corp., 47 FED. RESERVE BULL. 1179, 1181 (1961).

191. Firstamerica Corp., 45 FED. RESERVE BULL. 134, 137-38 (1959). See also Marine Corp., 47 FED. RESERVE BULL. 1179 (1961), reversing stand on acquire-to-compete argument in *id.* at 766.

192. BancOhio Corp., 44 FED. RESERVE BULL. 1389 (1958).

193. See note 181 *supra* and accompanying text.

194. See, e.g., Firstamerica Corp., 45 FED. RESERVE BULL. 134, 138 (1959).

195. See, e.g., Baystate Corp., 46 FED. RESERVE BULL. 1230 (1960).

derived only 15 per cent of its deposits from the proposed acquisition's primary service area.¹⁹⁶ On the other hand, when there was complete primary service area overlap, but several alternatives remained available, the application was approved.¹⁹⁷ In addition, where the proposed acquisition contemplated branch banking, the Board, although granting the application, viewed overlap of the primary service areas of applicant's banks with those of the proposed branch banks as threatening foreclosure of potential competition.¹⁹⁸ But the Board has disregarded primary service area overlap when the proposed acquisition and the applicant's presently held banks appear to have specialized in separate banking fields.¹⁹⁹

Board application of each statutory criterion is preliminary to a more perplexing task—determining the relative importance of the criteria. The statute indicates no appropriate net result in cases where some criteria are favorable to the transaction, others are unfavorable, and still others are neutral. Nor did Congress indicate a presumption for or against holding company expansion.²⁰⁰ In close cases, a majority of the Board has generally approved acquisitions,²⁰¹ to the dismay of certain members.²⁰² But in one major case the Board refused to approve the joinder of a large suburban bank and a large city bank though the first three criteria were found neutral, the fourth slightly favorable and the fifth slightly unfavorable.²⁰³ The Board assumed that the transaction would effect a decrease in consumer alternatives although there was no evidence regarding consumer behavior in that area.²⁰⁴

To restrict bank holding companies further, seven states have supplemented the federal statute. While New York's act is similar to the federal statute,²⁰⁵ the other states prohibit any effort to form a holding company and virtually freeze expansion of existing companies.²⁰⁶ Although preservation of banking competition has been relied upon to justify such statutes,²⁰⁷ the same states

196. First Bank Stock Corp., 46 FED. RESERVE BULL. 486, 491-92 (1960). See also Central Wisconsin Bankshares, Inc., 47 FED. RESERVE BULL. 760 (1961).

197. Bank Stock Corp. of Milwaukee, 47 FED. RESERVE BULL. 159, 161 (1961). See also Northwest Bancorporation, 47 FED. RESERVE BULL. 408 (1961). *But see* BancOhio Corp., 47 FED. RESERVE BULL. 412 (1961) (no attention to remaining alternatives).

198. Firstamerica Corp., 45 FED. RESERVE BULL. 134, 139-40 (1959). See also Northwest Bancorporation, 47 FED. RESERVE BULL. 408 (1961).

199. *Ibid.*; Bank Stock Corp. of Milwaukee, 47 FED. RESERVE BULL. 159, 161 (1961).

200. See S. REP. NO. 1095, 84th Cong., 1st Sess. 10 (1955).

201. See, e.g., Marine Midland Corp., 46 FED. RESERVE BULL. 1228 (1960).

202. Bank Stock Corp. of Milwaukee, 45 FED. RESERVE BULL. 1133, 1136 (1959) (Vice Chairman Balderston and Governor Robertson, dissenting).

203. First New York Corp., 44 FED. RESERVE BULL. 902 (1958).

204. *Ibid.*

205. N.Y. BANKING LAW § 141-47.

206. ILL. ANN. STAT. ch. 16½, §§ 71-73 (Supp. 1960); IND. STAT. ANN. § 18-1814-16 (Supp. 1961); KAN. GEN. STAT. ANN. § 9-504-7 (Supp. 1959); MASS. ANN. LAWS ch. 167A, §§ 1-7 (1959); MISS. CODE ANN. § 5235 (1957).

207. See ILL. ANN. STAT. ch. 16½, § 71 (Supp. 1960); *Braeburn Sec. Corp. v. Smith*, 15 Ill. 2d 55, 62, 153 N.E.2d 806, *appeal dismissed*, 359 U.S. 311 (1959).

which paralyze holding company growth also restrict the increased competition which branch banking might provide.²⁰⁸ Indeed, it is likely that the holding company laws are merely an attempt to prevent circumvention of branching laws²⁰⁹ because, if preservation of competition were truly the goal it would be difficult to justify total prohibition of bank holding companies. While acquisition of competitors by the same company would lessen competition, acquisition of non-competing banks with a resulting improvement in management or services might increase competition with other banks in the area.

Mergers

Broadly defined, the term bank merger includes any exchange or purchase of assets or stock among two or more banks to create a single unit.²¹⁰ During the financial crisis of the 1930's this device was often used to rescue failing banks.²¹¹ But even in the more prosperous 1950's, banks continued to merge, causing a decrease in bank population.²¹² No single motive predominated in this movement. The desire of larger banks to acquire deposits, branches, or managerial talent, to increase their lending limits, to eliminate a competitor or to increase the efficiency of existing resources were among the more important motives.²¹³ In addition, the depressed market for bank stocks, often selling for less than book value, encouraged mergers.²¹⁴ Since acquired banks' assets, mostly short term loans and government bonds, are easily liquidated, acquiring banks at no cost to themselves could offer a price as high as net asset value and induce stockholders to sell because they would receive more than the market value.²¹⁵ By eliminating at least one banking alternative, these transactions may lessen competition.

In 1960, Congress amended the bank merger provisions of the Federal Deposit Insurance Corporation Act. This amendment²¹⁶ allocates merger control of federally insured banks to federal bank supervisory agencies on the theory

208. See notes 124 to 139 *supra* and accompanying text.

209. Cf. ILL. ANN. STAT. ch. 16½, § 71 (Supp. 1960) (purpose of act to protect unit banks).

210. See FTC, REPORT ON CORPORATE MERGERS AND ACQUISITIONS ch. IV (1955).

211. *Hearings on the Regulation of Bank Mergers Before a Subcommittee of the House Committee on Banking and Currency*, 86th Cong., 2d Sess. 82 (1960) [hereinafter cited as *House Hearings*]; CHAPMAN, CONCENTRATION OF BANKING 81-84 (1934).

212. Between 1950 and 1959, 1503 banks, 10% of the previous total, have been absorbed by merger, 887 new banks have been chartered and 98 others have discontinued business resulting in a net decrease of 714. H.R. REP. NO. 1416, 86th Cong., 2d Sess. 4 (1960); see also Alhadeff, *Recent Bank Mergers*, 69 Q.J. ECON. 503 (1955).

213. *House Hearings* 82; Smith, *New York Banking's Troubled Giants*, *Fortune*, April, 1959, p. 115.

214. *Id.* at 214; *Hearings on Corporate Mergers Before the Subcommittee on Anti-trust and Monopoly of the Senate Committee on the Judiciary*, 84th Cong., 1st Sess., pt. 2, 727 (1955); N.Y. Times, Sept. 17, 1950, § 3 (Business), p. 1, col. 7.

215. *Ibid.*

216. 74 Stat. 129 (1960), 12 U.S.C.A. § 1828(c) (Supp. 1960).

that banking's peculiar nature—especially the need for solvency for the protection of depositors—merits specialized supervision.²¹⁷ Prior to the consummation of any merger transaction, the statute requires written approval by the appropriate federal banking agency—the Comptroller of the Currency for resulting national banks, the Federal Reserve Board for resulting state member banks, or the Federal Deposit Insurance Corporation (FDIC) for resulting insured state banks which are not members of the federal reserve system. Except in emergencies, notice of impending mergers must be published in local newspapers before an agency may act; and the agencies' decisions must be related to Congress annually. In evaluating merger applications, the appropriate agency is to consider

the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this [Act] [T]he appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest.²¹⁸

Except in emergencies, the appropriate agency is to request an advisory opinion on "the competitive factors involved" from the Attorney General, presumably expert in evaluating competitive behavior. To insure uniformity of decision, the appropriate agency must secure similar advisory opinions from the two other banking agencies.

The first five criteria which an agency must consider—financial history and condition, capital, future earnings, character of management, convenience and needs of the community—are derived almost verbatim²¹⁹ from the bank insurability provision of the Federal Deposit Insurance Corporation Act.²²⁰ In that context, these criteria presumably indicate the degree of a bank's solvency, enabling the FDIC to insure only solvent banks convenient and necessary to a community.²²¹ It is arguable, therefore, that by making these criteria applicable to bank mergers Congress directed the appropriate agency to evaluate the solvency of the absorbed banks. If failure of the merging bank were imminent, merger into a solvent bank would be approved; but if all the merging banks were solvent, the agency would then have to ascertain any adverse effect on competition, relying heavily on the opinion of the Attorney General. This interpretation accords with the gloss of the failing business doctrine on the merger provisions of section 7 of the Clayton Act.²²² Since failing businesses

217. See S. REP. No. 196, 86th Cong., 1st Sess. 16-19 (1959).

218. 74 Stat. 129 (1960), 12 U.S.C.A. § 1828(c) (Supp. 1960).

219. H.R. REP. No. 1416, 86th Cong., 2d Sess. 9 (1960).

220. 64 Stat. 873 (1950), 12 U.S.C. § 1816 (1958).

221. See S. REP. No. 1007, 74th Cong., 1st Sess. 3 (1935).

222. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1958).

would in the natural course of events cease to compete, competition would not be maintained by disallowance of merger into stronger firms. Notwithstanding apparent violation of the anti-merger provisions of section 7, such mergers are permitted in order to effect significant saving of economic resources.²²³ Consistent with this interpretation, Congress allocated responsibility for ascertaining imminent bank failure to agencies presumably expert in evaluating bank solvency.²²⁴ Thus interpreted, the new statute presumes a general pattern of competition, but excludes the situation of the failing or near-failing bank in the interest of the need for solvency in the banking system.

Congress undoubtedly favored the merger of failing banks into stronger institutions. The Senate and House committee reports indicate four situations, all likely to induce bank failure, where competitive considerations are to be disregarded and merger permitted.²²⁵ In explaining the bill to the Senate, its sponsor indicated that the first five criteria were directed at protecting depositors,²²⁶ intimating that his committee had included them to exclude the situation of bank failure. The House committee report and the House sponsor's explanation direct that these criteria be applied to "each of the banks involved,"²²⁷ apparently not to the resulting bank, indicating concern with solvency of the merging banks, not prediction of the resulting bank's financial prospects.

It is doubtful, however, that Congress considered imminent bank failure the only situation where merger would maintain a competitive structure. Since the statutory criteria were not specified as exceptions to a general principle of competition, Congress seems to have intended that equal weight should be given to each factor. Another Senate sponsor explained: "All of these . . . factors must be . . . weighed together, and the merger should be approved only if, after consideration of all these factors, the net result is in favor of the proposal."²²⁸ Consistent with this view, the Senate rejected an amendment proscribing mergers which lessen competition substantially or tend to create a monopoly unless failure or near failure of a merging bank be shown,²²⁹ because it feared that other exigencies might arise.²³⁰ Moreover, it is doubtful that Congress'

223. *International Shoe Co. v. FTC*, 280 U.S. 291 (1930); see also *Hearings on Proposed Financial Institutions Act Before House Committee on Banking and Currency*, 85th Cong., 1st Sess. 130-31 (1957); *Hearings on Proposed Financial Institutions Act Before Senate Banking and Currency Committee*, 85th Cong., 1st Sess. 1014 (1957).

224. In their day-to-day operations all three agencies examine the financial condition of banks; 62 Stat. 1163 (1948), as amended, 12 U.S.C.A. § 481 (Supp. 1960) (Comptroller of the Currency); 38 Stat. 261 (1913), as amended, 12 U.S.C. § 248(a) (1958) (Federal Reserve Board); 64 Stat. 873 (1950), 12 U.S.C. § 1820(b) (1958) (FDIC).

225. S. REP. No. 196, 86th Cong., 1st Sess. 19-20 (1959); H.R. REP. No. 1416, 86th Cong., 2d Sess. 10 (1960).

226. 105 CONG. REC. 8076 (1959) (remarks of Senator Robertson).

227. H.R. REP. No. 1416, 86th Cong., 2d Sess. 10 (1960); 106 CONG. REC. 7257-58 (1960) (remarks of Congressman Brown).

228. 106 CONG. REC. 9712 (1960) (remarks of Senator Fulbright).

229. 105 CONG. REC. 8125-39 (1959).

230. See, e.g., 105 CONG. REC. 8129 (1959) (remarks of Senator Javits).

only concern was with failing banks, since there is some indication that it did not intend that application of the criteria be limited solely to merging banks. The language of the FDIC statute requiring application of the criteria to resulting banks has not been expressly altered by its 1960 amendment.²³¹ And in contrast to the House committee report on the 1960 amendment, which requires focus on "each of the banks involved," the Senate report requires consideration of "the bank."²³² If the Senate report language refers to the resulting bank, the condition of the merging banks would be irrelevant and the statutory inquiry would be limited to forecasting the resulting bank's solvency. Furthermore, the banking criteria did not originate in the FDIC statute; they were carried over from the language of the statute governing charter of national banks.²³³ Adoption of the chartering statute criteria, therefore, may indicate that Congress intended to focus only on a single bank, the resulting bank, as if it were a newly chartered bank.

But Congress probably intended the following procedure: appraisal of the solvency of the merging banks, prediction of the resulting bank's solvency, determination of any solvency benefits or risks of a merger, and balancing this result against any effect upon competition or convenience to arrive at a final decision. This procedure would constitute a test which is compatible with the "each of the banks involved" language of the House report because of its examination of the merging banks, and would also require consideration of the resulting bank as intended by the "the bank" language in the Senate report.²³⁴ It accords with the requirement that "all of these . . . factors must be . . . weighed together."²³⁵ And it clearly provides for the situation of the failing or near-failing bank, since an increase in solvency through merger would seem to outweigh a decrease in competition.

In their first year applying the statute, the banking agencies appear to have followed this interpretation.²³⁶ In one case (out of ninety-four) failure of a merging bank was imminent.²³⁷ In many other situations, however, all three agencies have stressed increased solvency as a factor to be weighed against decreased competition even though they made no finding that the merging banks' failure was imminent or probable. Specifically, the agencies have viewed mergers as desirable remedies for banks having management succession problems²³⁸

231. See S. REP. NO. 196, 86th Cong., 1st Sess. 30-31 (1959).

232. *Id.* at 22.

233. S. REP. NO. 1007, 74th Cong., 1st Sess. 3 (1935).

234. See notes 227 and 232 *supra*.

235. See note 228 *supra*.

236. The reports of banking agency merger approvals are found in their Annual Reports to Congress, see note 216 *supra* and accompanying text: 1960 COMPTROLLER OF THE CURRENCY ANNUAL REPORT 52-106 [hereinafter cited as COMP. CURR. REP.]; 1960 BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ANNUAL REPORT [hereinafter cited as FRB REP.]; 1960 FEDERAL DEPOSIT INSURANCE CORPORATION ANNUAL REPORT 112-25 [hereinafter cited as FDIC REP.].

237. FDIC REP. NO. 2.

238. COMP. CURR. REP. CAS. NOS. 13, 23, 43, 44, 56; FRB REP. CAS. NOS. 14, 15, 17; FDIC REP. CAS. NO. 9.

or for banks in areas which are declining,²³⁹ overbanked,²⁴⁰ or have one major industry.²⁴¹ In addition, the agencies have been favorably impressed by allegations that capital increases²⁴² or "management depth"²⁴³ would result from merger. Thus, the rule emerges both from legislative history and from agency application that even if the merging banks are reasonably solvent, the resulting bank may conceivably be so much more solvent as to outweigh a decrease in competition.²⁴⁴

Moreover, Congress intended that the fifth factor—fulfillment of a community need or increased convenience—might in certain cases outweigh the elimination of some competition. Of primary concern was legitimization of mergers for the purpose of increasing loan limits to individual borrowers;²⁴⁵ providing a wider range of banking services to the community was also a relevant consideration.²⁴⁶ In approving mergers, the agencies have invariably relied, at least in part, on improved services as justifying decreased competition.²⁴⁷ In many situations the agencies have held that the needs of expanding areas merit the higher loan limits²⁴⁸ and increased loanable funds²⁴⁹ which mergers may provide. Promises to provide a wider range of services,²⁵⁰ more "aggressive management,"²⁵¹ or "more efficient operating services"²⁵² have been additional justifications.

Not only may solvency and service considerations outweigh decreased competition and justify merger approval, but Congress has apparently defined competition to include the merger-to-compete argument. Likening banking to the railroad industry which, as a regulated public utility, is subject to a less stringent competitive standard, the bill's sponsors asserted that banks too merit a modified competitive requirement,²⁵³ specifically validating the merger-to-compete argument.²⁵⁴ Since large banks lend on a national or regional scale, a

239. COMP. CURR. REP. CAS. NO. 16.

240. COMP. CURR. REP. CAS. NO. 7.

241. See COMP. CURR. REP. CAS. NO. 51.

242. COMP. CURR. REP. CAS. NOS. 1, 36, 41; FDIC REP. CAS. NO. 15.

243. COMP. CURR. REP. CAS. NO. 1.

244. Cf. notes 165-67 *supra* and accompanying text.

245. See 105 CONG. REC. 7827 (1959).

246. *Ibid.*; see also 106 CONG. REC. 9712-13 (1960).

247. COMP. CURR. REP. CAS. NOS. 1, 5, 7, 8, 11, 12, 13, 15, 19, 24, 27, 28, 31, 32, 34, 36, 37, 42, 43, 44, 46, 47, 49, 54, 56; FRB REP. CAS. NOS. 2, 3, 4, 6, 7, 10, 11, 12, 13, 14, 15, 16; FDIC REP. CAS. NOS. 1, 4, 5, 6, 9, 10, 12, 14, 15, 16, 17, 20, 21.

248. COMP. CURR. REP. CAS. NOS. 12, 19, 43; FDIC REP. CAS. NOS. 1, 8, 14, 15, 21.

249. COMP. CURR. REP. CAS. NOS. 15, 19, 30, 44, 46, 47, 49.

250. See COMP. CURR. REP. CAS. NO. 49.

251. FRB REP. CAS. NO. 11; FDIC REP. CAS. NOS. 19, 21.

252. FDIC REP. CAS. NO. 12; apparently the Comptroller of the Currency has emphasized increased solvency rather than better service as a result of increased efficiency, COMP. CURR. REP. CAS. NOS. 20, 22. These seem to be the only cases where economies of scale have been considered.

253. S. REP. NO. 196, 86th Cong., 1st Sess. 16-19 (1959).

254. *Id.* at 23; 105 CONG. REC. 8143 (1959) (statement of Senator Fulbright); 106 CONG. REC. 9712-13 (1960) (explanation by Senator Robertson).

market not accessible to small or medium-sized banks, merger of the latter would appear justified because entry of a new bank may render these larger markets more competitive. It is possible, of course, that a banking agency may consider the reduction in competition between the merging banks as more important than an increase in competition in the resulting bank's contemplated market. But in approving mergers of small banks,²⁵⁵ the banking agencies have apparently disregarded existing competition between merging banks if what they consider a sufficient number of other banking alternatives remain.²⁵⁶

State regulation of bank mergers—which exists in all but three states²⁵⁷—usually provides for administrative approval of such transactions to protect stockholders, depositors, and other creditors.²⁵⁸ Under these statutes state banking authorities seem to approve merger applications readily.²⁵⁹ Some state authorities must find the merger to be in the public interest,²⁶⁰ but there are no indications that these provisions are aimed at the preservation of competition.²⁶¹ In 1960, however, New York enacted a new bank merger statute which follows the federal statute in requiring administrative consideration of competition.²⁶²

An Appraisal

Despite the four year period separating their enactments, the federal holding company and merger statutes manifest a uniform approach to the problem of banking concentration. The criteria governing increased concentration—solvency, convenience and competition—and the process of weighing each against the others are similar in both statutes.²⁶³ Both allocate decision-making responsibility to banking agencies,²⁶⁴ and available evidence indicates that these agencies have applied the criteria of each statute in a uniform manner. For

255. COMP. CURR. REP. Cas. Nos. 2, 7, 19, 29, 37, 39, 42, 44, 55; FRB REP. Cas. Nos. 2, 5, 6, 7, 8, 11, 12, 13, 14, 16, 17; FDIC REP. Cas. Nos. 3, 6, 8, 14, 16. Apparently, the Attorney General has accepted this argument, see COMP. CURR. REP. Cas. Nos. 10, 42; cf. *id.* at Cas. Nos. 23 & 34 (resulting bank so large that smaller banks may have difficulty competing).

256. See COMP. CURR. REP. Cas. No. 2; FRB REP. Cas. Nos. 5, 13.

257. Alaska, Louisiana, and Rhode Island have no such legislation.

258. For a compilation of state bank merger statutes, see *Hearings on the Regulation of Bank Mergers Before the Senate Committee on Banking and Currency*, 86th Cong., 1st Sess. 183-200 (1959) [hereinafter cited as *Senate Hearings*].

259. 686 requests were granted between 1950 and 1959, *House Hearings* 19; see also *Senate Hearings* 37.

260. *Senate Hearings* 183.

261. Indeed, when competition is mentioned in the statute, it refers to possible adverse effects of competition on existing banks; see GA. CODE ANN. §§ 13-1305, 1323 (1936); see also *Delaware County Nat'l Bank v. Campbell*, 378 Pa. 311, 325, 106 A.2d 416, 423 (1954).

262. N.Y. BANKING LAW § 601-6 ("whether such merger . . . may result in such a lessening of competition as to be injurious to the interest of the public or tend toward monopoly").

263. Compare note 151 *supra* with note 216 *supra*.

264. Compare note 156 *supra* with note 217 *supra*.

example, the Federal Reserve Board has deemed relevant such considerations as increased service,²⁶⁵ management succession,²⁶⁶ and merger-to-compete²⁶⁷ arguments in both holding company and merger cases. This high degree of uniformity between the two statutes makes possible simultaneous appraisal.

A problem arising under both statutes concerns the extent to which increased bank solvency resulting from holding company acquisition or from merger should outweigh decreased competition. Even in the case of the failing bank, where rescue by merger or holding company acquisition is clearly preferable to insolvency, competitive considerations should be relevant. Available alternatives may be preserved by favoring acquisitions by a holding company owning no banks in the area or by mergers with non-competing banks; in contrast, merger with competing banks will *pro tanto* reduce alternatives. Moreover, attaching importance to increased solvency when bank failure is not imminent gives an administrative agency unwarranted discretion. Since in only one case has failure been imminent,²⁶⁸ the broad solvency criteria of the statutes should not permit the agencies to overlook solutions to the problem more consistent with preserving alternatives. Banking agency treatment of management succession problems provides a good example. The agencies have approved nine mergers and one holding company acquisition on the theory that, since no qualified personnel were available to replace retiring officers, the merged or acquired banks' solvency might be impaired at some future time.²⁶⁹ Since in three cases the transactions significantly decreased alternatives,²⁷⁰ a bank should at least be required to demonstrate to the agency that it has exercised due diligence in attempting to obtain qualified personnel. And good faith should be required of the acquiring or absorbing bank, so that it may not induce a management succession problem by pirating officers of a bank that it seeks to acquire. If due diligence and good faith are shown, acquisition of banks with management succession problems by non-competing holding companies or merger with non-competing banks is preferable to mergers or acquisitions which absorb one competitor into another.

Banking agencies might effect these policies if the present treatment of solvency considerations were abandoned and the following procedure adopted. If a banking agency determines that failure is imminent²⁷¹ and that rescue is available by acquisition or by merger, it should approve such a transaction, giving preference to a non-competing holding company or bank. But if failure is not imminent, though probable at some future time, as in the case of management succession or inadequate capital, the agency should order the bank to

265. Compare notes 170-77 *supra* with note 247 *supra*.

266. Compare note 166 *supra* with note 238 *supra*.

267. Compare note 191 *supra* with note 255 *supra*.

268. See note 237 *supra*.

269. See note 266 *supra*.

270. COMP. CURR. REP. CAS. NOS. 23, 44; FRB REP. CAS. NOS. 14.

271. Banking agencies seem particularly well-fitted for this task; see H.R. REP. NO. 1416, 86th Cong., 2d Sess. 9-10 (1960).

work out its difficulties, if that is possible, allowing a period for remedial action set to expire before failure is likely to occur. During this period, for example, the bank might try to obtain additional personnel or capital. If at the end of the period the situation has not been corrected, or if the difficulties are without the bank's control, the agency should permit the bank to be sold, but only under its supervision.²⁷² Since a public auction would notify the bank's depositors of its difficulties and might prompt a run, that method of sale seems inappropriate. Alternatively, the agency could inform management that it can sell the bank because merger or acquisition would make the bank both more secure and, therefore, more valuable, and would avoid losses accompanying liquidation. Management would be directed to negotiate with all prospective buyers, and submit the resulting proposals to the agency. Since competitors of the faltering bank may offer inflated terms for its stock in anticipation of monopoly profits,²⁷³ the agency should have authority to veto such proposals to preserve alternatives if other bids are satisfactory. Approved proposals would be submitted to the bank's shareholders whose consent would probably follow because, not only would they be unlikely to find more favorable outlets for their stock, but their refusal would inevitably render their shares in the ultimately insolvent bank worthless. If a bank's difficulties are due to its own shortcomings, threat of a supervised sale would encourage diligent effort by the bank to improve its financial condition and hence to continue as an alternative credit source, and, even if the bank were sold under agency order, the agency's preference for non-competing buyers would help keep the bank independent of competitors' control.

Both statutes provide that considerations relating to the convenience and needs of the community may outweigh predicted decreases in competition.²⁷⁴ Indeed, improved banking service has been used most frequently by the banking agencies to justify increased concentration.²⁷⁵

Apparently, the agencies' rationale has been that economies of scale permit larger banks to provide certain important services.²⁷⁶ But these services can generally be offered by small or medium-sized banks through their correspondents.²⁷⁷ The case of the large loan limit, the most frequently mentioned service attribute of large banks,²⁷⁸ is instructive. Since the amount that can be

272. See Comment, 68 YALE L.J. 1627, 1667 (1959).

273. *Ibid.*

274. Compare notes 168-77 *supra* and accompanying text with notes 245-51 *supra* and accompanying text.

275. See notes 168-77, 247 *supra*.

276. Unless this is so it would not follow that mergers are desirable in expanding areas because absent economies of scale, the banking services and resources available would be the same if there were a single large bank or many small banks; but see note 252 *supra*.

277. See generally BEATY, CORRESPONDENT BANKING (1951); *City Banks Lure Country Dollars*, Bus. Week, Oct. 24, 1959, p. 46; see also article in Banking, Sept. 1959, at p. 43.

278. See notes 172 and 248 *supra*.

lent to any one borrower is limited to a fixed per cent of the bank's capital,²⁷⁹ the argument runs, larger banks are desirable in certain areas to service the needs of large borrowers. But since there appears to be little pressure by large borrowers to acquire large loans from any single bank, this argument may be directed at a straw man. These businesses tend to be geographically decentralized and usually place a loan through a number of banks in areas where they operate.²⁸⁰ Moreover, such businesses are likely to find it cheaper to obtain large amounts of credit through public offerings of short-term notes.²⁸¹ Individual borrower limits are "relatively unimportant" in the rejection of small business loan applications.²⁸² But even if the demands of some borrowers cannot be satisfied at a single bank, that bank can invariably make funds available by participating with its correspondent in a joint loan.²⁸³ To the extent that the alternative of the correspondent relationship is available to minimize the consumer advantages of large scale operations in the case of other banking services, competition should not be subordinated to service considerations.

Moreover, to subordinate competition to prospects of better service except where economies of scale are pronounced, may be self-defeating. For, with less competition there will be little incentive to improve the services which large banks are allegedly in a unique position to offer. Indeed, when the number of competitors becomes so small that one bank knows that any service innovation it introduces may be copied immediately by others, innovation becomes unprofitable to the extent that it can be duplicated by competitors. Hence, service considerations should take priority over competition only if it can be shown that large banks alone can and indeed will provide the needed services.²⁸⁴

In considering "the preservation of competition," against which solvency and service considerations must be weighed in the Bank Holding Company Act, the Federal Reserve Board seems to have mishandled statistical data. In focusing on the data, the Board has used statistics referring to concentration of banking offices and deposits. Notwithstanding that little weight is given to

279. See note 172 *supra*.

280. Smith, *New York Banking's Troubled Giants*, *Fortune*, April, 1958, p. 115. The large loan limit argument assumes that large businesses prefer borrowing at a single bank. Why this should be true is unclear because in dealing with other suppliers, these businesses often prefer to buy from a number of firms so that they are not dependent upon a single source. Moreover, since one bank may negotiate a participation loan as a representative of the others, this technique seems equally convenient.

281. GUTHMANN & DOUGALL, *CORPORATE FINANCIAL POLICY* 442-45 (3d ed. 1955).

282. FEDERAL RESERVE BOARD, *FINANCING SMALL BUSINESS* 417 (1958).

283. See First New York Corp., 44 FED. RESERVE BULL. 902, 910 (1958); Naber, *Participation Loans*, *Banking*, January 1958, p. 49. In a survey conducted by *Banking Magazine* 67% of the banks replying said that their correspondent had participated in some of their loans; only 3% reported that this facility was unavailable to them, *Banking*, Sept. 1959, pp. 43, 47.

284. COMMISSION ON MONEY & CREDIT, *MONEY AND CREDIT* 165 (1961) ("Mergers that result in operating economies and which are forced by competition to pass on the benefits . . . should be encouraged . . .").

predicted changes in concentration,²⁸⁵ considering each banking office a separate alternative seems incorrect because all offices of branch banks and all banks of holding companies are included within the term "offices."²⁸⁶ To compound its error, the Board has ignored such real alternatives as savings and loan associations.²⁸⁷ Furthermore, since providing credit is a major banking contribution to the economy, the focus of the Board upon deposits to the exclusion of loans and investments²⁸⁸ is unjustified. In a sense, the Board is attempting to ascertain the extent of banking competition by focusing on concentration in raw material (deposits) markets, with no reference to concentration in production and selling (loans and investments) markets.

The defect of ignoring loans and investments is duplicated in Board analysis of overlapping primary service areas since these areas are limited to 75 per cent of a bank's *deposits*.²⁸⁹ In addition, even where the test of overlapping areas may be an adequate measure of the competition eliminated by a proposed transaction, the Board has impaired the usefulness of the test by approving mergers and acquisitions on the theory that the character of one bank's depositors differs from the character of the other's.²⁹⁰ For example, it is highly probable that there is strong competition between neighboring banks even though there is a 15 per cent difference between them in the proportion of business and individual depositors,²⁹¹ because both banks can offer identical services to each group. Aside from these misapplications, the use of primary service area overlap analysis alone is inherently inadequate. Except for the unusual situation where applicant banks have proposed branches with predictable primary service areas,²⁹² the use of overlaps ignores the problem of potential competition. A finding that two banks are not presently competing should not end the matter. So long as they remain independent, potential competitors, there is always a chance of competition; merger or acquisition precludes this possibility.²⁹³

But however inadequate the Board's attempts to determine "whether . . . the effect of [holding company] acquisition . . . would be . . . consistent with

285. See note 185 *supra* and accompanying text.

286. See note 181 *supra* and accompanying text.

287. See note 188 *supra* and accompanying text. But in approving mergers both the Comptroller of the Currency and the FDIC have considered interinstitutional competition, COMP. CURR. REP. Cas. No. 39; FDIC REP. Cas. Nos. 3, 21.

288. See notes 181, 183, and 184 *supra* and accompanying text.

289. See note 181 *supra*.

290. See note 199 *supra* and accompanying text. See also COMP. CURR. REP. Cas. No. 5; FRB REP. Cas. No. 5; FDIC REP. Cas. Nos. 3, 8. Since in other cases these agencies justify mergers because some non-bank institutions are so similar to banks as to offset the effects of decreased bank competition, *supra* note 287, it is interesting that in these cases the merging banks can be found to be so dissimilar that competition between them which the merger would eliminate is unimportant.

291. See FRB REP. Cas. No. 5; Firstamerica Corp., 45 FED. RESERVE BULL. 134, 137 (1959).

292. See note 198 *supra* and accompanying text.

293. See Central Wisconsin Bondshares, Inc., 47 FED. RESERVE BULL. 760, 763 (1961).

... the preservation of competition" have been, they are more responsible than the attempts of the Board and the other two banking agencies to "take into consideration the effect of [mergers] on competition." Notwithstanding that the statute mandates banking agency consideration of competitive factors, the agencies apparently give slight attention to them²⁹⁴ unless the Attorney General indicates that competition will be substantially lessened.²⁹⁵ Although this procedure is tolerable if the Attorney General's findings are responsible, in most cases the Attorney General gives no reasons,²⁹⁶ or at least no convincingly documented reasons²⁹⁷ for his conclusions, if he draws any.²⁹⁸ Since his opinions are of questionable weight anyway because they are merely advisory, his failure to include in them detailed analysis demonstrating in appropriate cases that competition would be substantially lessened renders them particularly unhelpful. If the Attorney General supported his conclusions, the banking agencies would at least be forced to adduce detailed evidence in rebuttal instead of relying on conclusionary generalizations.

But even if this procedure induced more deliberate decision-making, it is doubtful that the outcomes would be different not only because of the weight given to the solvency and service considerations discussed above,²⁹⁹ but also because the merger (or acquire)-to-compete argument, validated by Congress,³⁰⁰ provides the banking agencies an easy way to find mergers increasing competition.³⁰¹ To give weight, however, to the argument that mergers or holding company acquisitions involving small or medium-sized banks stimulate competition in areas dominated by large banks seems unwarranted. In view of the wide range of service which the correspondent relationship enables a smaller bank to offer,³⁰² it is uncertain, in the absence of detailed study by banking agencies or Congress, whether a larger bank has any appreciable competitive advantage. Moreover, this merger-to-compete argument overlooks

294. See COMP. CURR. REP. Cas. Nos. 8, 13, 14, 21, 24, 25, 31, 36, 41, 43; FRB REP. Cas. No. 10; FDIC REP. Cas. Nos. 1, 2, 4, 5, 9, 11, 12, 13, 17, 18, 20 (effect on competition not mentioned).

295. See COMP. CURR. REP. Cas. Nos. 2, 7, 37, 39; FRB REP. Cas. Nos. 2, 5, 13; FDIC REP. Cas. No. 15.

296. See COMP. CURR. REP. Cas. Nos. 1, 3, 4, 6, 9, 10, 18, 28, 29, 30, 34, 35, 36, 38, 41; FRB REP. Cas. Nos. 3, 4, 6; FDIC REP. Cas. Nos. 9, 16, 17.

297. See COMP. CURR. REP. Cas. Nos. 2, 5, 7, 11, 14, 17, 19, 20, 22, 23, 24, 26, 27, 31, 32, 33, 37, 39, 40, 43, 44, 46, 47, 49, 51, 53, 54, 55; FRB REP. Cas. Nos. 2, 5, 8, 10, 12, 13, 16; FDIC REP. Cas. Nos. 1, 2, 3, 4, 6, 7, 8, 10, 11, 12, 13, 14, 15, 18, 20.

298. In some cases the Attorney appears to have drawn no conclusions. COMP. CURR. REP. Cas. Nos. 8, 21, 50, 52, 55; FRB REP. Cas. Nos. 1, 11, 14, 15, 17; FDIC REP. Cas. Nos. 5, 19, 21. Perhaps the requirement that the report of its Attorney General be "summary" accounts for the lack of detail. However, even though all his reports are summary, they vary considerably in length and detail, intimating that they represent the total of his reasons and conclusions.

299. See notes 268-84 *supra* and accompanying text.

300. See note 254 *supra* and accompanying text.

301. See notes 255-56 *supra* and accompanying text.

302. See note 277 *supra* and accompanying text.

the disadvantages of decreased alternatives. Especially in banking, where entry is limited to assure the likelihood of survival of all entrants, any decrease in the number of potential competitors increases the degree to which remaining banks will consciously follow each other's actions, decreasing incentive to improve operations.³⁰³ In addition, decreased alternatives may mean decreased credit availability to the marginal risk borrower.³⁰⁴ Balanced against such disadvantages, significant reductions of alternatives in several cases, based on unsupported views that a sufficient number remain, and on the highly questionable theory that competition will be stimulated, seems unwarranted. By concentrating on merger and acquisition as means to produce large banks, Congress and the banking agencies have failed to consider that greater bank size can be achieved by other means consistent with competition, such as using retained earnings or acquiring additional capital.³⁰⁵

Congressional approval of a different standard of competition is justified, at least with regard to mergers, on a regulated industry or public utility analogy. Since mergers in other regulated industries are not subject to competitive standards as strict as those in unregulated industries, the argument runs, bank mergers should receive the same treatment because banking is a regulated industry.³⁰⁶ But this argument ignores significant differences in the purpose and extent of regulation of different public utilities. While economies of scale have induced the government to guarantee monopoly benefits to most public utilities, government has compensated for the absence of competition by rate and service regulation to protect consumers. But since banking displays no significant economies of scale,³⁰⁷ the industry would be no more efficient if operated as a monopoly or oligopoly under price and service regulation. And the controls which do seem necessary—those directed at solvency and money creation—are consistent with competition.³⁰⁸

Arguably, since these banking statutes do not exempt the industry from operation of the antitrust laws, the Sherman and Clayton acts might be employed to prevent anticompetitive mergers and acquisitions.³⁰⁹ Section 1 of the Sherman Act proscribes "Every contract, combination . . . , or conspiracy, in

303. See note 11 *supra* and accompanying text.

304. See notes 12 & 13 *supra* and accompanying text.

305. Cf. Comment, 68 YALE L.J. 1627, 1668-73 (1959).

306. See note 253 *supra*.

307. See notes 15-26 *supra* and accompanying text.

308. See *Peoples Savings Bank v. Stoddard*, 359 Mich. 297, 332-33, 102 N.W.2d 777, 795 (1960).

309. State antimonopoly law appears to have been used successfully on two occasions: *State v. Bankers' Trust Co.*, 157 Mo. App. 557, 138 S.W. 669 (1911); *Peoples Savings Bank v. Stoddard*, 359 Mich. 297, 102 N.W.2d 777 (1960). Compare *Hall v. San Jacinto State Bank*, 255 S.W. 506 (Tex. Civ. App. 1923).

On banking and the antitrust laws, see generally Berle, *Banking Under the Antitrust Laws*, 49 COLUM. L. REV. 589 (1949); Ramsey, *Banks and the Antitrust Laws: An Unsolved Problem*, 37 A.B.A.J. 427 (1951); Gruis, *Antitrust Laws and Their Application to Banking*, 24 GEO. WASH. L. REV. 89 (1955), 73 BANKING L.J. 793 (1956); Funk, *Anti-*

restraint of trade;"³¹⁰ section 2 punishes "Every person who shall monopolize, or attempt . . . , or combine or conspire . . . to monopolize any part of [inter-state] trade or commerce."³¹¹ These sections have recently been applied to banks for the first time;³¹² such application, however, may well prove ineffective. Both sections prohibit combinations which have sufficient power to exclude competitors³¹³ or to control prices.³¹⁴ While bank mergers or acquisitions can be shown to exclude existing competitors, proof that entry has been barred by the transaction is highly unlikely because entry of new banks into an area is directly controlled by government agencies rather than by market forces. And price control evidence is difficult to adduce, except where monopoly exists, because the most restrictive effects which might result from the transaction—price leadership, conscious parallelism or other forms of oligopolistic behavior—have not been held violative of the Sherman Act without proof of a specific agreement.³¹⁵

Section 7 of the Clayton Act, designed to limit incipient mergers, appears to be a more useful tool. It provides that:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . or . . . of the assets of another corporation engaged also in commerce, where in any of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.³¹⁶

The use of "may be" and "tend" was purposely included to avoid the Sherman Act's strict requirement that "actual competitive effects" be proved by permitting a finding of violation when there is a reasonable probability of a substantial lessening of competition.³¹⁷ Judicial and administrative interpretation of this provision dictate that consideration be given to decreased competition in all relevant markets³¹⁸—in banking: loans, investments, trust accounts, etc., as well as deposits. Attention must also be given to the trans-

trust Legislation Affecting Bank Mergers, 12 BUS. LAW. 496 (1957), 75 BANKING L.J. 369 (1958); Wemple & Cutler, *Federal Bank Merger Law and the Antitrust Laws*, 16 BUS. LAW. 994 (1961).

310. 26 Stat. 209 (1890), as amended, 15 U.S.C.A. § 1 (Supp. 1960).

311. 26 Stat. 209 (1890), as amended, 15 U.S.C.A. § 2 (Supp. 1960).

312. Wall Street Journal, June 5, 1961, p. 1. See note 326 *infra*. In 1954 a mortgage banking association, which included several banks, was charged with restraint of trade in FHA mortgages. The case was dismissed for lack of evidence. *United States v. Chicago Mortgage Bankers Ass'n*, 123 F. Supp. 251 (N.D. Ill. 1954).

313. See *United States v. Columbia Steel Co.*, 334 U.S. 495, 524 (1948).

314. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940).

315. See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 41 (1955); NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* 49-54, 81-94 (1960).

316. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1958).

317. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 115-18 (1955). *But see* NEALE, *op. cit. supra* note 315, at 449-55.

318. See *Transamerica Corp. v. Board of Governors*, 206 F.2d 163, 169 (3d Cir. 1953), *cert. denied*, 346 U.S. 901 (1953); ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 119-24 (1955).

action's "long range competitive consequences" to determine the effect on potential competition.³¹⁰ Moreover, proof that strong competition will remain after the transaction would seem to be no defense if the competition eliminated were substantial.³²⁰ The argument that mergers or acquisitions should be approved to enable the resulting or acquiring bank to increase production of loans to compete with larger banks is not recognized by the courts.³²¹ And in considering the effect on competition both the Attorney General³²² and the courts³²³ can be expected to avoid the mere conclusionary generalizations of the banking agencies and to study in detail the patterns of competition before and after the merger as well as many other relevant factors.³²⁴ Unfortunately, section 7 applies only to bank stock acquisitions;³²⁵ bank mergers, however, are invariably effected by asset acquisition.³²⁶ In addition, while section 7 excepts the plight of the failing business, judicial determination of imminent failure might be too time consuming and inexpert to prevent bank failures.

Some of the advantages of section 7 could be retained and some of the disadvantages eliminated if the following measures were adopted. First, the FDIC merger provisions and the Bank Holding Company Act should be amended to limit banking agency jurisdiction to banks alleging imminent or predictable failure. Second, section 7 should be amended to apply to banks only if a banking agency has no jurisdiction over a merger or acquisition transaction. Where the agency has jurisdiction, it would invoke the previously discussed rescue procedures—immediate merger or acquisition if failure is imminent, or solvency correction measures, if practical, under continued agency supervision and threat of supervised sale if failure is not imminent but predictable. And, because of the agency's exclusive jurisdiction, agency approved transactions would be immune from subsequent antitrust prosecution.³²⁷ Third, the FDIC Act and the Bank Holding Company Act should be repealed insofar as they conflict

319. *Id.* at 127.

320. See *id.* at 127-28 ("The test is whether the amount of competition lost is substantial.").

321. Comment, 68 YALE L.J. 1627, 1668-73, 1675 (1959).

322. NEALE, *op. cit. supra* note 315, at 211 n.1.

323. See *id.* at 209-14.

324. Although representatives of the banking agencies characterized the § 7 test as quantitative, *Hearings on Regulation of Bank Mergers Before Senate Committee on Banking and Currency*, 86th Cong., 1st Sess. 24, 67 (1959), this interpretation does not appear to be correct, ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 122 (1955); NEALE, *op. cit. supra* note 314, at 452.

325. H.R. REP. No. 1416, 86th Cong., 2d Sess. 9 (1960).

326. *Ibid.*

327. Friction between the banking agencies and the Department of Justice has been intense and constant since passage of the merger statute. See N.Y. Times, April 7, 1961, p. 41; *id.*, April 16, 1961, § 3, p. 1; *id.*, Sept. 3, 1961, § 3, p. 1; *id.*, Sept. 18, 1961, p. 45. On five occasions the Department attacked under the antitrust laws transactions which the banking agencies had previously approved. See N.Y. Times, Feb. 26, 1961, p. 61; *id.*, March 2, 1961, p. 35; *id.*, March 3, 1961, p. 33; *id.*, August 30, 1961, p. 43; *id.*, Sept. 9, 1961, p. 1.

with this procedure. These statutory changes would bring most bank mergers and acquisitions within section 7, but would delegate the problem of the failing bank to an expert agency. That faltering banks should be handled by one agency, rather than by the three presently considering such problems, seems preferable in the interest of uniform standards.³²⁸

Since bank holding companies are presently subject to section 7,³²⁹ this solution would not affect existing competitive standards for further acquisitions. It would, however, facilitate the acquisition of failing banks. In addition, if the present *prima facie* legitimacy of Board-approved acquisitions were eliminated by adoption of the proposed amendment, the Department of Justice might be less reluctant to enforce section 7.³³⁰ The legislative history of the federal bank merger statute reveals that the banking agencies opposed section 7 standards because a quantitatively-determined reduction in competition would invalidate many desirable mergers.³³¹ These were said to include situations

where there is a reasonable probability of the ultimate failure of the bank to be acquired; or where because of inadequate or incompetent management the acquired bank's future prospects are unfavorable and can be corrected only by a merger with the resulting bank; or where the acquired bank is a problem bank with inadequate capital or unsound assets and the merger is the only practicable means of solving the problem; or where several banks in a small town are compelled by an overbanked situation to resort to unsound competitive practices, which may eventually have an adverse effect on the condition of such banks, and the merger would correct this situation.³³²

Consequently, the banking agencies argued that these special bank situations merited a different competitive standard.³³³ But the problem in each situation described—"ultimate failure," unfavorable prospects, "inadequate capital or unsound assets," "adverse effect on the condition of such banks"—is bank solvency. If, on the agencies' own illustrations, this is the primary characteristic setting banks apart from other industries, this problem alone should be isolated and treated differently. And apart from a problem of bank solvency, there is no warrant for allocating responsibility for competitive determinations to bodies as non-expert as their conclusionary generalizations in the absence of detailed statistical data have shown the banking agencies to be.

328. See S. REP. No. 1095, 84th Cong., 1st Sess., pt. 1, 14; *cf. Too Many Bosses in Banking*, *Bus. Week*, November 7, 1959, p. 182.

329. *Transamerica Corp. v. Board of Governors*, 206 F.2d 163 (3d Cir. 1953), *cert. denied*, 346 U.S. 901 (1953).

330. That banking agency approval is considered a factor in antitrust litigation is shown by the Attorney General's condition in one case that approval could be given by the Comptroller of the Currency only if the fact of approval were not introduced as evidence in a subsequent suit. See *N.Y. Times*, August 23, 1961, p. 43.

331. See note 324 *supra*.

332. H.R. REP. No. 1416, 86th Cong., 2d Sess. 10 (1960).

333. See note 324 *supra*.